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No. _____

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ALEXANDER L. STEVENS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SEA-LAND SERVICE, INC.,

Petitioner,

—against—

CARL O. AKERMANIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

**PETITION OF SEA-LAND SERVICE, INC.
FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT**

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QUESTIONS PRESENTED FOR REVIEW

1. Where respondent consented in district court to a Judgment on a Reduced Verdict in response to the trial court's offer of a "remittitur" which was beyond the power of that court to grant, did the court of appeals lack jurisdiction to entertain his cross-appeal?
2. When the district court granted a new trial on "the liability issues" in the event the "remittitur" was not accepted, was it a violation of the United States Const. amend. VII and the Judiciary Act of 1789 for the court of appeals, after having concluded that the "remittitur" accepted by respondent could not validly have been offered, to re-examine facts found by a jury by its own review of the evidence at trial for the stated purpose upon remand of "focus[ing] the district court's attention on matters that may obviate the need for a new trial. . . .?"
3. Can the court of appeals remand a case to a district court for "further consideration consistent with. . . [its] opinion" and ask for a re-exercise of discretion on an issue upon which the court of appeals has held the district court had already acted without abuse or mistake in law?
4. Where a district court orders a new trial in response to a motion pursuant to Rule 59 Fed.R.Civ.P. because of "clear and serious error" by the jury on a finding of fact, and is held by the court of appeals to in all respects have applied the law correctly and not to otherwise have abused its discretion, can the court of appeals properly issue an advisory opinion in order to "focus the district court's attention" on an alternative interpretation of how the jury might conceivably have interpreted the facts, in order to reach a result more pleasing to the court of appeals, without improperly impairing the subsequent exercise of discretion of the district court?
5. In reconsidering the question of "clear and serious error" on the part of the jury and, hence, whether it should adhere to

its new trial order, did the district court follow the court of appeals' mandate?

6. If the district court followed the appeals court's mandate, was it thereby obliged to apply an incorrect standard of review; or did it do so?

7. Did the court of appeals on petitioner's subsequent (second) appeal, from the order of the district court on remand denying the new trial motion, err in not reversing on account of: prior error by the court of appeals, the district court's refusal to follow the court of appeals' prior mandate, or error by the district court in not applying the correct standard of review; or in the interests of justice?

8. If the court of appeals was required to affirm the district court's grant of a new trial, because in all respects it correctly understood and applied the law and did not abuse its discretion, should the court of appeals have ordered a complete new trial on all issue of liability and damages? In a seaman's comparative fault personal injury case brought pursuant to 46 U.S.C. § 688 et seq. (the Jones Act) are the liability issues ever "completely separable" from the issue of damages, and were they in this case?

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**PETITION OF SEA-LAND SERVICE, INC.*
FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT**

OPINIONS BELOW

The decision of the court of appeals filed September 14, 1982 reversing the district court's judgment and remanding the case for further consideration consistent with the opinion, reported in 688 F.2d 898, is reprinted in Appendix "A."¹ The decision of the court of appeals dated October 28, 1982 denying petitioner's motion for rehearing and suggestion for rehearing *en banc* appears here in Appendix "B." The memorandum opinion of the United States District Court, Southern District of New York of October 14, 1981 deciding petitioner's motion pursuant to Rule 59 Fed.R.Civ.P. by granting a new trial on "liability issues" in the event respondent should not accept a "remittitur" is reported at 521 F.Supp. 44 and is reprinted in Appendix "C." The opinion of the district court denying petitioner's motion for reargument of that decision is reprinted in Appendix "D." The Judgment on a Reduced Verdict from which appeal was taken to the United States Court of Appeals, Second Circuit is reprinted in Appendix "E." The decision of

* Parent companies:

R.J. Reynolds Industries, Inc.
Sea-Land Industries Investments, Inc.

Affiliates:

Sea-Land Industries, Inc.
Sea-Land Industries (Bermuda) Ltd.
Sea-Land Industries, U.S.A., Inc.
Sea-Readiness, Inc.

¹ References followed by "A" are to the joint Appendix to the briefs on the appeal decided September 14, 1982. References preceded by "H" are to be found in the appendix of this petition containing selected factual material taken from the trial record.

the district court on remand, which is dated January 18, 1983, directing entry of judgment on the jury verdict despite respondent's agreement to accept the Judgment on a Reduced Verdict, is unreported and appears in Appendix "F."² The informal order of the court of appeals affirming entry of judgment on the jury verdict, filed June 17, 1983, is here reprinted as Exhibit "G." On January 26, 1983 petitioner filed a petition for writ of certiorari from the court of appeals' decision of September 14, 1982 (No. 82-1302) which was denied May 16, 1983 (103 S. Ct. 2087), before affirmance by the court of appeals of the district court's decision of January 18, 1983.

JURISDICTION

Petitioner seeks review of decisions of the Court of Appeals for the Second Circuit filed September 14, 1982 and June 17, 1983. By order dated October 28, 1982, the court of appeals denied petitioner's petition for rehearing and suggestion for rehearing *en banc* from the decision of September 14, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) with respect to both decisions, notwithstanding the prior denial of certiorari. See, *Hamilton-Brown Shoe Co. v. Wolff Brothers & Co.*, 240 U.S. 251 (1916).³

² Petitioner's motion for reargument of the district court's January 18, 1983 decision was denied without opinion, February 8, 1983.

³ On March 17, 1983, this Court requested that respondent file a brief in answer to the petition No. 82-1302. This brief, which was filed on or about April 20, 1983, opposed the granting of the writ for reason, among others, that "[c]onsideration by this Court is unnecessary since the Petitioner currently has an appeal pending in the Court of Appeals." Brief of respondent in No. 82-1302, p.19

STATUTES INVOLVED

U.S. CONST. amend. VII:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of common law.

Judiciary Act of 1789, 1 Stat. at L.84:

Sec. 22. And be it further enacted, That final decrees and judgments in civil actions in a district court, where the matter in dispute exceeds the sum of value of fifty dollars, exclusive of costs, may be re-examined, and reversed or affirmed in a circuit court, holden in the same district, upon a writ of error,****(a) And upon a like process, may final judgments and decrees in civil actions, and suits in equity in a circuit court, *** be reexamined and reversed or affirmed in the Supreme Court, **** (b) But there shall be no reversal in either court on such writ of error for **** any error in fact.****

46 U.S.C. § 688 (Jones Act); 45 U.S.C. § 51 *et seq.* (Federal Employers' Liability Act [FELA]; Rule 50(c) and (d) F.R.Civ.P., 28 U.S.C. § 2106 (1976)

STATEMENT OF THE CASE

This is a Jones Act personal injury case brought by a former third assistant engineer aboard petitioner's vessel S.S. LOS ANGELES which, following a jury trial, resulted in a verdict in respondent's favor for \$528,000.

Respondent claimed that he sustained injury to his neck on June 4, 1977 while at work out on deck in allegedly too rough weather pursuant to "order" of the vessel's chief engineer. During trial conducted before the Honorable Charles S. Haight, Jr. in the United States District Court Southern Dis-

trict of New York in June 1981, a substantial issue was raised of petitioner-shipowner's liability on account of respondent's discretion to accomodate his schedule to prevailing wind and sea conditions,⁴ particularly in light of his description of the instruction given him with respect to the work.⁵ Additionally, petitioner urged at trial respondent's contributory negligence on basis of his having had an alternate safe course of conduct available by virtue of his admitted discretion to defer the work in which he was engaged at the time of the accident, awaiting more propitious circumstances.⁶ Finally, petitioner disputed its

4 Respondent during cross-examination characterized the weather conditions as "a little bit too rough" [H-2]. At the time of his alleged injury he was burning off a deteriorated metal fitting on a pedestal located on deck adjacent to one of the vessel's hatches. According to the ship's deck log wind force was 5 on the Beaufort scale (17-21 knots) at 8:00 A.M. June 4, 1977 and abated to force 3-4 (11 to 18 mph) by noon. Plaintiff was allegedly hurt at 10:30 A.M. At 8:00 A.M. the sea conditions were described as "slightly moderate" [1137A]; at noon they were characterized as "slight head sea and small swell" [1179A].

5 Respondent testified on direct examination that the third assistant engineer's told him at about 8:00 A.M. the morning of the accident that the chief engineer wanted him to "work on that securing—that turnbuckle gear, burn it off and reweld it and new parts were to be made" [H-1]. The making of new parts was to be accomplished in the underdeck machine shop. There was no other testimony with respect to what respondent was told to do that day; and respondent's description of the work assignment is consistent only with an "order" to do work on deck or under deck that morning at his sole discretion. Based on respondent's admissions, it would appear that petitioner could properly have been found liable for negligence (the sole basis upon which the liability issue was submitted to the jury) on account of "failing" to order respondent off the deck when, as would have been likely, his presence was observed by the watch officer on the bridge. This could only have been some small part of respondent's contributory fault.

6 Respondent, in addition to describing on direct examination the work as involving a project requiring work both on deck (burning off old fittings and rewelding new) and underdeck (fabricating the new weldings), admitted on cross-examination that as part of the "mutual respect" exchanged among the licensed engineers "no one needed to tell [him] precisely when or precisely how to do anything as simple as this job of replacing the pedestal supports" [H-5]. This assignment had (perhaps) been given before

liability on the basis, as the district court held, of claim that "whatever symptoms plaintiff had suffered, or was suffering from, resulted from other physical conditions and maladies, not related to the alleged accident." 521 F. Supp. at 47 [C-3].

Respondent did not stop working following his unwitnessed accident, which he never reported. He sought medical attention only after a fainting episode occurring June 7, 1977, following which he was examined and found (perhaps all but incidentally) to have "strained muscle"; in apparent addition to a carotid bruit (described by respondent as a difference in his "pulses") heard by the doctor in Rotterdam to whom he asked to be sent on account of his concern, in light of his blackout, for his ability to withstand the rigors of an airplane flight home [722-724A]. He was repatriated the same day, not on account of any injury but because the vessel had gone into regularly scheduled lay-up, as a consequence of which the entire crew was relieved.

Respondent claimed at trial that he had suffered a neck sprain aggravating a preexisting condition of cervical arthritis described by a physician who treated him upon his return home as so advanced as of the time of the injury as then to have "disqualified" him from work as a merchant seaman [H-6]. At the time of his alleged shipboard accident respondent was 59 years old.

The jury awarded respondent \$528,000 by special verdict, but not before first inquiring whether they need "install figures" [H-9] for the damage elements, despite the court's ample charge on that issue. This verdict, which the district court, characterized as "undoubtedly generous" (521 F. Supp. at 52 [C-13]), included \$250,000 for pain and suffering and \$118,000 for future wage loss, in addition to \$160,000 allegedly lost on account of plaintiff's inability to work in the years between the occurrence of injury and trial. The verdict conformed (in

the vessel's arrival in the North Atlantic, *en route* from the Mediterranean [657-8A]. The accident occurred on Saturday, during voluntary overtime when plaintiff could not have been ordered to do the work in which he was involved when hurt, according to plaintiff's witness, the maritime expert Captain Adams [1185A].

thousands) in all respects to the figures asked for by the attorney for respondent in summation. With respect to comparative negligence the jury found but 4% of the blame for the occurrence attributable to respondent's own fault.

Respondent retired from life at sea in September 1977 after determining that his maritime employment as of June 1977 entitled him to the maximum pension from his union. Respondent's retirement, hence, occurred *before* his being declared "permanently not-fit-for-duty" on September 15, 1977 on account of "cervical spine" [1869A]. From that time until trial respondent was hospitalized on five occasions⁷ for unrelated medical conditions including arteriosclerotic heart disease, peripheral vascular insufficiency, diabetic neuropathy, cataracts and peptic ulcer. The jury's verdict for \$118,000 future lost wages was returned four months after he reported to doctors at the United States Public Health Service, New Orleans, Louisiana that he was unable to walk more than 100 yards over level ground on account of a condition described in those records as "intermittant claudication" [H-10]—exertional leg pains resulting from compromised circulation secondary to arteriosclerosis. Respondent was awarded \$250,000 in damages for pain and suffering despite proof from his medical records that in October 1977 he had reported to treating doctor that "Tylenol keeps arthritis pain under control" [H-11].

Petitioner's post-trial motion pursuant to Rule 59 F.R.Civ.P asserted excessiveness of the jury award and that the jury finding of but 4% contributory negligence was contrary to the great weight of the evidence.⁸ On October 14, 1981 the district

7 The first of which occurred in December 1977 in response to dizziness, difficulty walking and impaired visual acuity resulting from stenosis caused by a 95% blockage (by arteriosclerotic plaque) of the left internal carotid artery, a condition suspected by virtue of the same carotid bruit apparently first heard in Rotterdam. Respondent's history of dizziness began no later than 1972, according to the medical records available at trial.

8 In support of its new trial application petitioner also asserted misconduct of the attorney for respondent who, in summation, told the jury without basis that petitioner's witnesses, the vessel's chief mate and engineer, had lied. See, 521 F. Supp. at 53 [C-15]. This argument was rejected by the

court denied petitioner's motion for a new trial on all issues urged by petitioner save for the jury's finding of 4% contributory negligence concerning which the district court held: ". . . in the circumstances of this case, I have no difficulty at all in concluding that the minimal percentage assigned to that fault constitutes clear and serious error." 521 F. Supp. at 50 [C-9]. Instead of ordering a new trial on all issues as required, the district court conditionally granted a new trial on the issue of "liability" (only), in the event respondent did not consent to a "remittitur." The "remittitur" did not reduce damages on account of excessiveness, but achieved the same result by increasing the jury's finding of 4% contributory fault to 25%, a confessedly arbitrary substitution by the court of a thought-to-be more appropriate figure based upon canvass of West's Federal Reporter Digest headnote references to similar cases.

Petitioner promptly sought reargument from the district court's decision on the basis that the "remittitur" was an illegal additur in contravention of this court's holding in *Dimick v. Scheidt*, 293 U.S. 474 (1935), an application in which respondent did not join. This motion was denied by order dated November 2, 1981 [D-1].

On November 9, 1981, respondent, in order to avoid retrial and the risk (in a "close" case of liability) of an adverse verdict or, at least, a contributory negligence finding substantially greater than 25%, consented to the trial court's "remittitur." On November 17, 1981 a final "Judgment on a Reduced Verdict" [E-1] was entered from which petitioner appealed, asserting, as it had in district court, that the "remittitur" was illegal and that the district court's holding that damages and liability were "completely separable" was error. Respondent "cross-appealed," only then claiming, despite his consent to entry of the judgment appealed from, that the trial court had no power to grant the "remittitur" which he had accepted; and that the assessment by the trial judge of the jury's verdict on the issue of contributory negligence was in error, on account of mistake in evaluation of the jury's fact finding because of district court; and by the Court of Appeals (without discussion) as being "without merit," despite the baselessness of the attorney's assertion.

confusion with the proscribed defense of assumption of risk. The court of appeals, by decision of September 14, 1982 (docket Nos. 81-7833, 81-7873), reversed the district court judgment and remanded for "further *consideration* consistent with . . . [its] . . . opinion." 668 F.2d at 907, [A-14], emphasis supplied.

The decision of the court of appeals unquestionably considered both petitioner's appeal and the cross-appeal of respondent, despite the fact that the latter was from a remittitur order to which he had consented. The basis of the reversal, was the district court's error in ordering a "remittitur" which was, in fact, an illegal additur. 668 F.2d at 902 [A-5]. The basis for the remand for further consideration was the court of appeals' independent evaluation (based on *its* own review of the trial testimony, *its* inferences drawn therefrom and *its* speculation as to what the jury "might have concluded") of the question of *fact* whether the district court's "clear and serious error" finding—which the court of appeals specifically held was *not* the product of mistake of law or abuse of discretion (668 F. 2d at 904, [A-9]), was necessarily correct.⁹

Petitioner did *not*, of course, appeal from the ruling favorable to it—the district court's October 14, 1981 holding on petitioner's post-trial motion pursuant to Rule 59 F.R.Civ.P. that the jury verdict finding but 4% contributory negligence represented "clear and serious error" which would result in a miscarriage of justice if allowed to stand. Instead, petitioner appealed only from the conditional nature of the new trial grant on grounds (among others) that the "remittitur" remedy was not within the power of the district court to authorize; and that the power of the district court to order a retrial could not properly be restricted to "liability" because that issue and damages were not "completely separable," the showing re-

9 The question of possible error by the district court (other than mistake in understanding or applying the law correctly or abusing its discretion) was said to have been raised by respondent on cross-appeal ("cross-appellant is prepared now to show us [a new trial] should never have been ordered"). 668 F.2d at 903 [A-8]. In reality, it was a matter raised not by the respondent but by the court *sua sponte*.

quired in case of a partial new trial grant by this Court's holding in *Gasoline Products Co., Inc. v. Champlain Refining Co., Inc.*, 283 U.S. 494 (1931).¹⁰

The issue, therefore, of whether or not the district court mistakenly decided the threshold issue of jury error on the contributory negligence issue was not before the court of appeals on petitioner's (as opposed to respondent's) appeal and, as a result, the court, as it acknowledged, had to "turn to" the cross-appeal (688 F.2d at 903, 904 [A-9]) if a partial retrial (at least) was to be avoided.¹¹ The inquiry which followed was avowedly for purpose of "afford[ing] us the opportunity to focus the District Court's attention on matters that may obviate the need (sic) for a new trial or at least [further] limit its scope." *Id.* at 904 [A-9].

Upon remand following denial of a petition for rehearing from the court of appeals decision [B-1], the district court, after noting and rejecting petitioner's argument that the decision of the court of appeals should not be considered because advisory and an unauthorized interference with the district court's discretion, acknowledged the court of appeals' man-

10 As the district court acknowledged, petitioner claimed at trial that respondent had sustained no damages. This is defense to liability in a negligence case. See, e.g., Prosser, *The Law of Torts*, 4th Ed., p. 143. With respect to the question of "complete separability" in a FELA or Jones Act case, see *Norfolk Southern Railroad Co. v. Ferebee*, 238 U.S. 269 (1915).

11 This fact was additionally acknowledged by the court of appeals in its September 14, 1982 opinion by its characterization of petitioner's appeal as one "which [only] challenges the District Court's authority to use the device of a remittitur to adjust the jury's determination of the contributory negligence percentage." 688 F.2d at 902 [A-4]. Most fundamentally, were it tenable to suggest (as did respondent in opposition to petitioner's petition for writ of certiorari denied May 16, 1983) that the court of appeals, *could have* considered the threshold issue in respondent's opposition (as appellee) to petitioner's appeal, it would follow that the court of appeals' opinion contains a contradiction: were the correctness of the jury error finding not a fact only *assumed* and *not* considered on the appeal as opposed to the cross-appeal, reversal of the judgment on the basis of unavailability of the remedy of "remittitur" could only follow from an *affirmance* of the district court's right to refuse to enter judgment on the jury verdict.

date as the law of the case requiring a "review of the pertinent evidence, with proper deference to those portions of Judge Newman's opinion which analyze it" [F-2]. In so reviewing the evidence, the district court *disagreed* with the factual analysis of the court of appeals, but not with its suggestion of what was the desired result. More importantly, it disregarded the court of appeal's mandate.

The court of appeals, in its September 14, 1982 opinion considering the cross-appeal, concluded that ". . . Judge Haight was acting within his broad discretion in ruling that a finding of only four percent contributory negligence was against the weight of the evidence and that a new trial should be granted." 688 F.2d at 904 [A-9] (footnote omitted). This provisional affirmation was, however, predicated on the holding by the court of appeals that the trial court had "reasoned that the jury's finding of contributory negligence was based on a conclusion that Akermanis had the authority to schedule his own work and that he exercised poor judgment by agreeing to work on the Los Angeles' deck on June 4, 1977, when he might have deferred the task to another day." *Id.*

Of professed concern to the court of appeals was whether its perception of the trial judge's view of the issue, as involving respondent's right to schedule his work on the day of the accident, was also "the jury's conclusion" (*Id.*); or whether "[t]he jury might have concluded that Akermanis was directed to work on the pedestal at the time of the accident, [i.e. had no discretion despite the fact that the sole proof on the question was his admission that the project he was directed to perform included a task underdeck] but that he was negligent in the manner in which he performed his work." 688 F.2d at 905 [A-10].¹² Thus, the district court was specifically mandated to

12 This unprecedented speculation on the thought processes of a jury by a court of appeals was based on the court of appeals' supposition that issue of "work performance" negligence was raised by plaintiff's testimony on cross-examination to the effect that at the time of his accident he "didn't watch. .[his]. .foot." *Id.*, n. 4 [A-10]. But he said this (as the district court later tacitly agreed) in effort to explain his inability to account for what had happened, not to explain why the accident occurred.

"consider whether the work performance theory of contributory negligence finds enough support in the evidence, assessed in the context of the entire trial, to justify the four percent factor. *If he concludes it does not, then his order for a new trial will stand.*" (*Id.*, emphasis supplied). [A-11]

The court of appeal's central speculation concerning what else the jury might have concluded was, however, considered by the district court on remand in terms, not of the evidence of negligence in respondent's performance of the work ("didn't watch my foot"), but what the jury might have *mistakenly* concluded on the basis of arguments of counsel in summation—by respondent's attorney that the work area was restricted; and by petitioner's (from proximate cause) that the accident had been entirely the product of plaintiff's "momentary lapse of carefulness" [F-8].

Having committed error in considering the "work performance" issue upon mistake of attorneys' arguments for evidence, the district court then improperly turned to what the court of appeals had concluded would be to the *resulting* jury error issue—whether, even if the 4% finding could be "justified" on account of "work performance" negligence, the "jury would have committed serious error if they had not attributed at least [an additional] part of the responsibility for the accident to Akermanis for continuing to work on deck despite the inclement weather and unsafe conditions." *Id.*, [A-11].

After improperly proceeding to consider the resulting jury error issue after *failing* to find any *evidentiary* support for contributory negligence in performance of the work in disobedience of the court of appeal's mandate, the district court, on the basis of plaintiff's overtime sheets for the voyage, arrived, in its opinion of January 18, 1983, at a "significantly altered perception" [F-9] of what (despite the court of appeals' holding of what the basis of the district court's assessment had been) the district court *then* said had been the reason for its original jury error finding. According to the district court's opinion on remand, the basis of the original remittitur was *neither* "continuing to work" *nor* (of course) "work performance," but ". . . the perception I then had that Akermanis could, and

should, have performed this on-deck . . . work, while LOS ANGELES was still in the sheltered waters of the Mediterranean." *Id.* The altered perception permitted a finding "justifying [respondent's] working on the pedestal at the time of the accident" because he had previously "devoted significant periods of overtime to the ongoing on-deck project." This "eliminat[ed] from consideration the concept that Akermanis foolishly waited until the North Atlantic to perform work that he could have accomplished in the Mediterranean" [F-11], a finding upon which the district court had initially *in part* explained its jury error finding.¹³ With respect, however, to the first question the court was bound to resolve by the appeals' court's mandate—whether evidence of "work performance" negligence supported the jury's 4% finding, the district court held that it was its "feel" that it was upon the theory of plaintiff's "continuing to work" on June 4, 1977—not on "work performance"—that the "jury held plaintiff entitled to less than his full damages"¹⁴ (F-11).

13 In its opinion of October 14, 1981 the district court quoted ("in pertinent part") its contributory negligence charge which, *as quoted*, ended with the phrase "into the North Atlantic." 521 F. Supp. at 50 [C-8]). The charge as actually given, however, concluded with the appended phrase "or that the vessel having reached the North Atlantic plaintiff could have deferred his work to another day" [2113A]. Despite the fact that on remand the district court was instructed to reconsider what the jury had thought, the trial judge ignored the fact that all petitioner argued in summation, the surest guide to what the jury thought (and the argument of substance for contributory negligence), was: Did he have to do the burning that morning? Could he have waited until the afternoon? Could he have waited until the next day? The answer clearly is yes [2008A]. The trial record discloses that respondent was sailing on his fourth issuance of his chief engineer's license at the time of his "injury" [664A].

14 The district court "justified" the minimal jury finding on the basis that "[t]he chief engineer had made it plain that he wished this work completed before the vessel reached Rotterdam" [F-10]. There is no such evidence in the record. Similarly, the court's description of "the work" respondent was assigned [F-10, 11] distorts the record because it omits the fact that "new parts were to be made." In any event, it is certain that the district court ultimately concluded that the jury's view of the contributory negligence issues was that view which the court of appeals had said was

In sum, in preference to adopting the court of appeals' speculation concerning the potential significance of a mere scrap of testimony, the district court absolved the jury (which had awarded respondent all it could remember his attorney asking for as damages) by accusing *itself* of error; thus allowing the trial judge to achieve (by virtue of its disobedience of the court of appeal's mandate) the result preferred by the court of appeals—entry of judgment on the jury verdict.

On March 7, 1983 petitioner appealed to the second circuit court of appeals from the district court's opinion of January 18, 1983 and the judgment on the jury verdict [F-12] which resulted. On June 17, 1983 the court of appeals affirmed, ignoring petitioner's argument that the district court had refused to follow the court of appeals' mandate and holding that the trial judge upon reconsideration of the jury error questions "had not abused his discretion in refusing to order a new trial." This second panel of the court of appeals also held that it could not reconsider the issues determined in the opinion of September 14, 1982 absent showing of "special circumstances" why the court should do so in the "interests of justice." [G-2]

As a result of the petitioner's appeal from the Judgment on a Reduced Verdict and its *correct* challenge to the remedy of "remittitur," the judgment against it, instead of being vacated, stands now substantially *increased*. It is from this result which petitioner seeks relief, in this last step in an exhaustive exercise misguided throughout by considerations of "judicial economy."

"superficially inconsistent" with a finding of *any* liability. 688 F.2d 904-905 n. 3 [A-9,10]. Paradoxically, the district court also held that "continuing to work" was "from defendant's point of view. .[a]. .less appealing proposition" [F-10].

REASONS FOR GRANTING THE WRIT

By exercising jurisdiction over respondent's cross-appeal in violation of binding decisions of this Court, the court of appeals usurped the exclusive right of the district court to re-examine facts found by the jury. As a result, the district court's subsequent exercise of discretion was impaired and petitioner was deprived of a right to jury trial free of "clear and serious" error in finding of fact.

A) Error by the Court of Appeals in its September 14, 1982 Opinion

The court of appeals' decision of September 14, 1982 was in error in *at least* the following respects: (1) in holding because of the "rationale" of *Donovan v. Penn Shipping Co., Inc.*, 429 U.S. 648 (1977) (aff'ing *Donovan v. Penn Shipping Co., Inc.*, 536 F.2d 536 (2d Cir. 1976)) that respondent, despite his consent, had a right to bring a cross-appeal from a remittitur order and the "clear and serious error" finding upon which it was necessarily dependent; (2) in concluding because of the "spirit" of Rule 50(c) and (d) F.R.Civ.P. that it had jurisdiction to consider a cross-appeal which it *acknowledged* had become, after decision of the appeal setting aside the Judgment on a Reduced Verdict, a non-final order for a new trial; and, (3) in determining that it had "general authority," pursuant to 28 U.S.C. § 2106 (1976), to "require such further proceedings to be had [reconsideration by the district court of the factual basis of its "clear and serious error" finding] as may be just in the circumstances," a conclusion violating this Court's holding in *Fairmount Glassworks v. Cub Fork Coal Co.*, 287 U.S. 474, 481 (1933) which: (i) required the court of appeals to re-examine facts found by the jury although proscribed by the United States Constitution, Amend. VII and the Judiciary Act of 1789; where (ii) according to the Second Court of Appeals in *Portman v. American Home Products Corp.*, 201 F.2d 847, 848 (2d Cir. 1953) and *Compton v. Luckenbach Overseas Corporation*, 425 F.2d 1130 (2d Cir. 1970), district court orders

granting or denying new trials are *not in any event* reviewable for errors in fact. In sum, the court of appeals considered a barred cross-appeal over which it had no jurisdiction in order to undertake a sterile exercise which it had no right to perform; and which *could not* result in a decision on the merit of arguments raised, not by respondent's cross-appeal, but by the court itself.¹⁵

Petitioner challenges the court's power both to consider the correctness of the district court's finding of "clear and serious" jury error prior to retrial; and at any time. The correctness, procedurally, of the court of appeal's September 14, 1982 decision is a matter both of whether the cross-appeal was barred and whether after "excision" of the "remittitur" the new trial order was ripe for review.

In response to the district court's October 14, 1981 decision on petitioner's new trial motion, respondent, on November 9, 1981, filed a "Consent to Reduce Jury Verdict" [I-1] providing that "[i]n consenting to the reduction of the verdict . . . , plaintiff does not waive any rights which he may have to appeal nor does he waive any right . . . to cross-appeal in event of an appeal by the defendant." In *Woodworth v. Chesborough*, 244 U.S. 79 (1917) plaintiff, in order to avoid retrial of damages held to be excessive by the court of appeals and obtain final district court judgment, filed a "remission of the excess" of a jury verdict "without prejudice" and then brought a "cross-writ of error" from the remittitur order in "assertion of the right attempted to be preserved." 244 U.S. at 82. In dismissing the cross-writ of error, this Court characterized plaintiff as being "in the somewhat anomalous position of having secured a judgment . . . , and yet seeking to retract the condition upon which it was obtained." After holding that "[t]his he cannot do," this Court added (*Id.*):

15 A concatenation of considerations of "rationale" (688 F.2d 898 at 903 [A-7]) "spirit" (*Id.* at 904 [A-9]) and "general authority" under 28 U.S.C. 2106 (1976) (*Id.*) led only to disposition as follows: "In short, the District Judge, upon remand, has discretion whether or not to order a new trial." *Id.* 905-6. [A-11].

He encounters, besides, another obstacle: If the remittitur be disregarded, the judgment entered upon it must be disregarded and the original judgment . . . restored; which not being final, cannot be reviewed.

Thus, the issues on cross-appeal in this case were *absolutely* indistinguishable from *Woodworth v. Chesborough*; yet the court of appeals failed to follow it. Instead, the court held that it was "conceptually difficult and practically unfair to think of the plaintiff as having waived a cross-appeal by consenting to a *judgment* which no longer exists." 688 F.2d 903 [A-7], (emphasis supplied). Upon this holding, and the alleged waiver and efficiency "rationale" of *Donovan v. Penn Shipping Co., Inc.*, *supra*, the court of appeals concluded:

[w]hat we really face is an issue which has nothing to do with acceptance of remittitur: whether a cross-appeal will lie as to a non-final order for a new trial when the main appeal from a final judgment has already brought the case to an appellate court. 688 F.2d 903 [A-8].

In considering a barred appeal on account of the fact that the *judgment* "no longer exist[ed]," the court ignored the fact that this Court in *Donovan*, *supra* held as recently as 1977 that "[a] line of decisions stretching back to 1889 has firmly established that a plaintiff cannot appeal the propriety of a *remittitur order* to which he has *agreed*" 429 U.S. at 649, (emphasis added); and that this Court, considering an appeal from acceptance of remittitur "under protest," held (*Id.* at 650) "[i]n order to clarify whatever uncertainty might exist, we now reaffirm the long standing rule that a plaintiff in federal court . . . may not appeal from a *remittitur order* he has *accepted* (emphasis added). It is therefore clear that the apparent attempt by the court of appeals to limit in effect plaintiff's consent to the judgment, as distinguished from reduction of the verdict, as a pre-condition of avoiding retrial (which could only fortuitously result in a judgment in the same amount), is completely artificial. It is not less than cruel in light of the fact that the verdict (in the court of appeals' view)

continues to exist and is now the basis of the present, yet larger, judgment.¹⁶

It is apparent from *Woodworth v. Chesborough*, *supra*, that the court of appeals should have refused to consider the cross-appeal because both barred by respondent's consent and, if his consent were to be excused, the remittitur order's resulting non-finality. It might be said that non-finality, if only because in a procedural sense the ultimate cross-appeal issue, was as the court held, what it "really faced." But this is clearly of no moment for in *Woodworth v. Chesborough*, too, the main appeal from a final judgment had "already brought the case to an appellate court." That fact together with the court of appeals' acknowledgement that Rules 50(b) and (c) were "not intended to alter the scope of appellate review" (688 F.2d 904 [A-8]) proves that whatever the true "rationale" of *Donovan*¹⁷ the court of appeals exceeded its jurisdiction by considering a non-final order.

This, of course, is not a case where the district court granted judgment notwithstanding the verdict and also, as Rule 50(c)

16 Consideration of the cross-appeal cannot be justified on account of the fact that the district court's "remittitur" was an additur which the court was without power to grant. Every remittitur can be said to be an abuse of discretion. Such argument would mean that *Donovan* would not apply to cross-appeals. But in *Woodworth v. Chesborough* the cross-writ of error was dismissed.

17 It is by no means apparent that this Court's reason for affirmance was other than that the rule was settled law. The Second Circuit Court of Appeals has twice justified the rule barring immediate appeal from remittitur orders on grounds antagonistic to this panel's view. In *Mattox v. News Syndicate Co.*, 176 F.2d 897 (2d Cir. 1949) the court held simply that a consenting plaintiff was "not bettered" (176 F.2d at 904) as a result. This is precisely what was here allowed, by relieving respondent of the requirement of retrial as a precondition of challenging the remittitur order, and with that possible complete exoneration of defendant. In *Donovan v. Penn Shipping Co., Inc.*, 536 F.2d 536, 538, the court of appeals justified the rule on basis of waiver and detriment, as a result of the loss of a "additional gauge" of the correctness of the district court's decision as a result of retrial. The court of appeals simply refused to follow its prior *Donovan* decision, despite its affirmance. This cannot be said to be other than disobedient.

F.R.Civ.P. requires, conditionally ruled on a companion motion for a new trial. Rule 50(d) F.R.Civ.P. is similarly inapplicable since respondent, as appellee, did not "assert grounds entitling him to a new trial"—he was entitled to a new trial without appeal by provision of the conditional nature of the district court's remittitur order. An appellate court's power pursuant to Rule 50 F.R.Civ.P. to "otherwise order" that retrial not be had when provided for as an alternative upon granting judgment n.o.v. is entirely irrelevant since the court of appeals did *not* reverse the new trial grant. This is a case in which the "spirit" of the Rule was to all appearances invoked simply as an excuse for not following the law—and on a point as settled as the "final order" rule of federal appellate jurisdiction. Such departure is all but inexplicable in light of the thoroughness of the district court's October 14, 1981 opinion.

The district court's analysis of the issue of contributory negligence in a Jones Act case was specifically approved. 688 F.2d at 904 n.2. [A-9] And the court of appeals also held, not only that the court's grant of a new trial was on its face a justified exercise of discretion but that, in the circumstances, however the issue was subsequently viewed or how different the result, that too would be within the court's "discretion." As the September 14, 1982 opinion makes plain, the court of appeals was without power to ". . . modify, vacate, set aside or reverse . . ." (28 U.S.C. § 2106 (1976)) the new trial grant aspect of the district court's remittitur order for the most basic of reasons: the determination that the jury's finding of only 4% contributory negligence was "clear and serious error" could not even be said to have been *mistaken*.

Moreover, since errors in assessing facts by a district court in granting or denying a motion for a new trial are non-reviewable (*Portman v. American Home Products, Inc., supra*; *Fairmont Glassworks Co. v. Cub Fork Coal Co., Inc., supra*), the court of appeals had no power to ever review the cross-appeal for error of a kind which the court itself (as opposed to respondent) asserted. For this reason, the court's "entertaining" and "turning to" the issue on cross-appeal of the correctness of the district court's "clear and serious error" finding

cannot be justified on grounds of an appeals court's "general authority" under 28 U.S.C. 2106 (1976) ". . . to require such further proceedings to be had as may be just under the circumstances." Its entire impact was only to interfere with the district court's renewed exercise of "discretion." Ancillary orders pursuant to a court of appeals' general authority cannot be appropriately issued where a violation of both a Constitutional guarantee and the Judiciary Act of 1789. In addition, the court of appeals' decision of September 14, 1982 raised "doubts" of the correctness of the district court's finding of jury error not occurring to the attorney for respondent, despite its own rule that in assessing the question of abuse of discretion (in considering the question of excessiveness of damages) "[it] must give the benefit of every doubt to the judgment of the trial judge." See, *Dagnello v. Long Island R. Co.*, 289 F.2d 797, 806 (2d Cir. 1961).

There can be *no* question that the Second Circuit Court of Appeals decision speculating upon the thought processes of the jury violated a cardinal principle of federal jurisprudence. *Thezan v. Maritime Overseas Corp.*, 708 F.2d 175, 180 (5th Cir. 1983) And there is little doubt that the court of appeals was aware that it had no basis for confidence that it was acting within its authority, a fact made plain from the absence of citation to precedent and the very inventiveness of the opinion itself. Because of the requirement under S. Court Rule 17.1(a) that the court of appeals be shown to have "so far departed from the accepted and usual course of judicial proceedings. . . , as to call for an exercise of this Court's power of supervision," it is appropriate to suggest that the court of appeals' decision of September 14, 1982 is explicable, but only on the basis of a mistake more fundamental than has yet appeared.

B) The Reason For the Court of Appeals' Disobedience of Authority

It is respectfully submitted that the court of appeals' decision is the product of a essential misperception of the nature of jury trial right. Although its September 14, 1982 opinion does

not so state, it is apparent that it was the court of appeals' view that the district court was wrong in paying insufficient regard to what it referred (in the particular context of remittitur) as "the sanctity of jury fact finding." 688 F.2d at 902 [A-4]. What it did the court of appeals would no doubt justify on the basis that the decision of the district court in refusing to enter judgment on the verdict because of jury error was in derogation of, and hence an attack upon, what the court of appeals to all appearances viewed as respondent's right, not to a jury trial, but *to a particular jury verdict*. This misperception pervades every mistaken aspect of the court's September 14, 1982 opinion.

For this reason, the court of appeals, confronted with a most thoroughgoing district court opinion, after conceding that "[o]rdinarily, we might not be so concerned that a trial judge explicitly consider every possible justification for a jury's verdict before concluding that a verdict is against the weight of the evidence and ordering a new trial" (688 F.2d at 905 [A-10-11]), held the exercise required because "this case arises under the Jones Act, and jury findings under that Act, . . . are particularly resistant to being overturned." *Id.* at 905 [A-11].¹⁸

Surely, issues raised in a personal injury case of negligence, contributory negligence and unliquidated damages are particularly appropriate for jury resolution; not just on account of their subtlety but since as this Court held in *Norfolk Southern Railroad Co. v. Ferebee, supra*, the jury's function in such a case involving comparative fault is to award "a just compensa-

18 Despite acknowledging this because of his "feel" for a case a trial judge is "normally (sic) in the best position to determine whether a verdict is against the weight of the evidence" (688 F. 2d at 905 [A-11]), the court of appeals insisted that the district court exclude all possible interpretations of the testimony which it, as opposed to the trial judge, "felt" were appropriate. That a district court's "feel" extends to issue-identification as well as issue-determination is clear from the language of the decision which the court of appeals invoked but did not follow. In *Neely v. Eby Construction Co.*, 386 U.S. 317, 325 (1967) this Court held that the district court "rather than" the court of appeals should pass on a new trial motion "because of the trial judge's first-hand knowledge of witnesses, testimony, and issues. . . ."

tion" in light of the facts considered together. Despite this, the court of appeals held that a second jury, if necessary, could determine the question in this case of even *an* element of comparative fault separately, as a matter of the district court's "discretion" 688 F.2d at 906 [A-12]. The court's erroneous view of all aspects of "separability" issue, which because of *Norfolk Southern Railroad Co. v. Ferebee* unquestionably violates *Gasoline Products Co., Inc. v. Champlain Refining Co., Inc.*, *supra*, was justified because the jury's damage award was returned "by detailed special verdicts" as a result "enabling a trial or a reviewing court to be reasonably certain that an erroneous verdict was reached independent of another verdict." 688 F.2d at 906 [A-13]. This is reflective of the court of appeals' exaltation of the alleged right to a particular verdict, even on a single element of an unitary issue, at the expense of the jury trial right. No *single* jury need ever award free of obvious error "a just compensation" as a result of this mistaken choice. The "separability" requirement must give way to the urgent requirement that a district court adopt any aspect of any verdict as long as *that* determination, however dependent, is "supported by the evidence."

Similarly, the court of appeals expression of reservation whether *Donovan*, *supra*, might have been incorrectly decided (see, 688 F.2d at 903 [A-6-7]) would seem also motivated by the special view of this panel of the court of appeals of the "sanctity of jury fact-finding." The question whether remittitur orders should be immediately appealable is, in addition to other considerations, dependent upon whether as a general matter resort to such device is perceived as "good" or "bad." This, in turn, depends on how the jury trial right is perceived: as vesting in a successful litigant something very close to a property right in the verdict, or as a right to determination of the facts by a jury free of clear and serious error.

The view of this panel of the Second Circuit Court of Appeals is made plain by its apparent preference for that court's dissenting view in *Donovan*, which supported a right to immediate appeal from such an order for the following reasons:

Granting a new trial unless plaintiff accepts a remittitur is an attempt by judge to reduce a jury verdict because he feels it is excessive. To this extent it is presumably an invasion of the jury's prerogative *and the right of the plaintiff to its determination*, and can be justified only in limited situations. 536 F.2d 536, 539, (dissenting op., Feinberg, J., emphasis supplied).

This view presumes error by the court (no matter how profound its conviction) in refusing to accept the verdict rather than mistake by the jury in assessing the facts; or it implies a jury prerogative to return virtually any verdict it chooses. It is wrong for three reasons: It mistakes of the nature of the right to jury trial made apparent by this Court's holding in *Dimick v. Scheidt, supra*—allowing remittitur (if in the alternative, accompanied by a new trial grant) while disallowing additur: *it is not a particular jury's fact finding which is sacrosanct but the right to a jury trial.*¹⁹ Second, the right to trial by jury includes the right of review by the district court for jury errors in fact finding and with that the power (and absolute duty) of the district court to grant a new trial when appropriate. Third, refusal to accept a jury verdict is justified in *any* circumstance (and in *only* those circumstances) in which the district court "feels" in proper exercise of its discretion that the error in fact finding is "clear and serious," or the verdict is so excessive as to be "shocking." A *presumption* of error by the district court (*or* a requirement that a district court pass on every possible interpretation of the facts) renders meaningless the court's obligation in considering a new trial motion to grant relief in such circumstances, even if there is substantial evidence to support the verdict, upon the courts own weighing of the evidence, whether or not in the light most favorable to the prevailing party. *Bevevino v. M.S. Saydjar*, 574 F. 2d 676, 677, 683-684 (2d Cir. 1978).

In *Aetna Casualty & Surety Co. v. Yeatts*, 122 F.2d 350, 353, 354 (4 Cir. 1941) that court stated:

19 The grant of a remittitur or a new trial vitiates the former but, of course, in no way affects the latter.

The exercise of this power [to set aside jury verdicts for error in fact] is not in derogation of the right of trial by jury but is one of the historic safeguards of that right. (Citations omitted). The matter was well put by Mr. Justice Mitchell, speaking for the Supreme Court of Pennsylvania in *Smith v. Times Publ. Co.*, *supra* [178 Pa. 481, 36 A 198], as follows: "The authority of the common pleas in the control and revision of excessive verdicts through the means of new trials was firmly settled in England before the foundation of this colony, and has always existed here without challenge under any of our constitutions. It is a power to examine the whole case on the law and the evidence, with a view of securing a result, not merely legal, but also not manifestly against justice,—a power exercised in pursuance of a sound judicial discretion, *without which the jury system would be a capricious and intolerable tyranny*, which no people could long endure. This court has had occasion more than once recently to say that it was *a power the courts ought to exercise unflinchingly.*" (Italics supplied).

* * *

To the federal trial judge, the law gives ample power to see that justice is done in causes pending before him; and the responsibility attendant upon such powers is his in full measure. While according due respect to the findings of the jury, he should not hesitate to set aside their verdict and grant a new trial in any case where the ends of justice so require.

C) **The Effect of the Court of Appeals' Error in Its September 12, 1982 Opinion and Its Further Error, on June 17, 1983, of Affirming the District Court's Renewed Exercise of "Discretion"**

It is no answer to the obvious disobedience of the court of appeals to binding decisions of this Court and its disregard for fundamental principles of federal jurisprudence to say, there being no question that a decision granting or denying a new

trial, being interlocutory, can be recalled at any time prior to decision on appeal and issuance of the mandate establishing law of the case, (see, *United States ex rel GREENHALGH v. F.D. Rich Co., Inc.*, 520 F.2d 886 (9 Cir. 1975)), that the court of appeals error was harmless on account of any alleged independence of the district court's renewed exercise of "discretion."

It is, of course, true that the district court in its January 18, 1983 opinion rejected the court of appeals' speculation that the jury might have attributed all of its finding of contributory negligence to plaintiff's supposed "negligence in the manner in which he performed his work." 688 F.2d at 905 [A-10]. But it is equally true that the district court was required on remand to consider "whether the 'work performance' theory of contributory negligence finds enough support *in the evidence*, assessed in the context of the entire trial, to *justify* the four percent factor," failing which the district court's "order for a new trial will stand." *Id.* at 905 [A-11] (emphasis added). It is perfectly clear from the decision on remand that the district court "justified" the verdict not on the evidence but "in the context of the entire trial"—because the jury might understandably have been misled by arguments in summation. And in so doing, the district court violated the court of appeals mandate which must be carried out, even if the mandate was in error. *Crane Co. v. American Standard, Inc.*, 490 F.2d 332, 341 (2d Cir. 1973, Friendly, J); *Sibbald v. United States*, 37 U.S. (12 Pet.) 488, 492 9 L.Ed 1167 (1838); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 140 (1940); *Briggs v. Pennsylvania R.R.*, 334 U.S. 304, 306 (1948) *Munro v. Post*, 102 F.2d 686, 688 (2d Cir. 1939). Moreover, if the district court followed the mandate of the court of appeals, if it were directed to consider context *rather than* evidence, this was plain error by the court of appeals. Surely, this was the district court's interpretation since it explained rather than "justified" the verdict; and on the basis which trial motion is designed to *correct*—jury error.

But the second panel of the Second Circuit Court of Appeals, in its decision of June 17, 1983 affirming the district court's renewal exercise of "discretion," declined to hold the

district court to what alone appropriately could have been the mandate of the September 14, 1982 decision and, in effect, allowed a *de novo* reconsideration by the district court as if there had been no mandate with respect to the manner in which the trial court was bound to reconsider the issue.²⁰ The net effect of the two decisions by the court of appeals was to encourage the district court to change its mind, and allow the trial judge resort to his own devices so that end might be accomplished. That the court of appeals' decision of September 14, 1982 was purely advisory is proven by the subsequent treatment of its mandate as trivial, a conclusion which is unmistakable from the affirmance by informal order by the second panel of that court on June 17, 1983.

All this is, of course, *not* to say that a contrary result by the district court in *initially* re-examining the evidence at trial for jury error, one holding that there had *not* been clear and serious error, would not also been free from successful attack on appeal.²¹ There is no disputing that a district court's discretion in deciding such a motion is as wide as the ethical

20 The district court, despite the court of appeals' holding that it, the district court, had reasoned that the jury's finding of contributory negligence was based on respondent's "continuing to work" on June 4, 1977, upon remand *disagreed*. In sum, the court of appeals on September 14, 1982 "affirmed" an exercise of discretion which petitioner was later asked to assume the court of appeals misperceived. But that this "misperception" was law of the case is plain from the mandate directing the district court to go no further in the event it found (as it did) that "work performance" was not the basis of the jury's finding.

21 This is, obviously, not to say the second assessment was more "right" than the first. Overwhelmingly, there is reason for confidence that this is not so. At trial, petitioner brought up the question when the respondent was first told to renew the pedestal supports in order to show that respondent had various work assigned to him with which to occupy his time (and overtime) for purposes of further demonstrating respondent's deliberate, personal choice to work on deck that morning. It is also not to be questioned that the district court viewed the contributory negligence issue in more depth initially; and initially based its jury error conclusion (as the court of appeals held) on the ground which is more than amply supported in the record: that "[n]o compulsion to do this work at that time appears" 521 F. Supp. at 51 [C-10].

basis for its assessment of error is supposed to be profound. What the appeal posture of this case would have been had the district court initially decided the new trial motion on the same basis as it did January 18, 1983 is simply irrelevant.

D) The Potential Impact of the Court of Appeals' Errors in Future Cases

This is a case raising important questions of a court of appeals' jurisdiction; but it is much more. Its result will have the more important designed effect of discouraging new trial grants, at least in personal injury cases. The court of appeals' opinions will stand in the future from on what proved to be their impact in this case: powerful discouragement, despite the depth of its ethical "feel" on a question as fundamental as miscarriage of justice, to conscientious exercise of discretion by district courts in any case where a court of appeals (no matter how speculatively) can say (despite the thoroughness of a trial judge's opinion), and upon whatever exhaustive combing of the record, that a "fact" has been "overlooked" and that with proper "focusing of attention" a clear and serious error may be "justified" upon reconsideration.

Despite acknowledgment in its September 14, 1982 opinion (688 F.2d at 901 [A-3]) of the different standard of review applicable to motions for judgment n.o.v. and for a new trial, the court of appeals paradoxically insisted upon renewed consideration on the basis of the inappropriate measure. In requiring further consideration, the court of appeals directed the district court not to reweigh all the evidence taken together but to search for *any evidence* to support the jury's finding; and unquestionably sought to have the district court interpret respondent's "didn't watch my foot" testimony in the light most favorable to his interest. As a result of the radical change in basis for determining trial motions which is suggested, future district courts will be encouraged to abandon consideration of the proper, ethical basis for a new trial grant; will reconcile verdicts rather than evaluate them; and as a result will not respond to perceived error as required by traditional rules.

The court of appeals' "do-over" remand and subsequent affirmance of a judgment resulting from disobedience of that court's mandate will not, however, necessarily achieve the "judicial economy" which to all appearances was sought. If a case such as this can ultimately result in a judgment for an amount which was arguably limited only by the extent of an attorney's ambition, there will be scant encouragement for personal injury plaintiffs to settle. But on the other hand, what might be seen as a jury's caprice unrestrained by any meaningful review by a trial judge may make the jury system intolerable to personal injury defendants. In any event, appropriate concern for preservation of the historic right to jury trial is not served by encouraging unpredictable results by a jury assessing the facts; or by the federal courts applying the law.

CONCLUSION

The lengths to which the court of appeals went to assure respondent's supposed "right" to an "undoubtedly generous" particular verdict awarding unliquidated damages as requested, where argument that the verdict had been secured by misconduct was *at least* colorable, is simply unprecedented in the history of federal jurisprudence. This Court should reverse and remand the case to the district court for a new trial on all issues.

Dated: New York, New York
September 14, 1983

Respectfully submitted,

JOSEPH T. STEARNS
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New York, New York 10005
(212) 344-4700
Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Argued May 12, 1982

Decided Sept. 14, 1982

Nos. 1088, 1089, Dockets 81-7833, 81-7873

CARL O. AKERMANIS,

Plaintiff-Appellee-Cross-Appellant,

—v.—

SEA-LAND SERVICE, INC.,

Defendant-Appellant-Cross-Appellee.

Joseph T. Stearns, New York City (Sandra R.M. Gluck and Walker & Corsa, New York City, on the brief), for defendant-appellant-cross-appellee.

Steven Thaler, New York City (Markowitz & Glanstein, New York City, on the brief), for plaintiff-appellee-cross-appellant.

Before FEINBERG, Chief Judge, and NEWMAN and WINTER, Circuit Judges.

NEWMAN, Circuit Judge:

This appeal concerns primarily the issue, apparently one of first impression in the federal courts, whether a trial judge may use the device of a new trial order conditioned on a remittitur to increase a jury's determination of the percent of responsibility for an injury that is attributable to a plaintiff's contributory negligence. That device was employed in this suit under the Jones Act, 46 U.S.C. § 688 (1976), brought by plaintiff Carl O. Akermanis, an injured seaman, against defendant ship-

owner Sea-Land Service, Inc. After plaintiff agreed to the remittitur, the District Court for the Southern District of New York (Charles S. Haight, Jr., Judge) entered judgment on November 17, 1981, in favor of the plaintiff. 521 F.Supp. 44. Defendant appeals, contending that it is entitled to an unconditional order for a new trial. Plaintiff cross-appeals, seeking an increased judgment based on the jury's initial determination as to the share of responsibility attributable to his negligence. For reasons that follow, we conclude that a remittitur may not be used to adjust a jury's contributory negligence percentage, and we therefore reverse and remand for further proceedings.

In the spring of 1977, Akermanis was a third assistant day engineer aboard Sea-Land's vessel S/S Los Angeles during a voyage from Greece to Rotterdam. One of the plaintiff's duties was to replace deteriorated angle irons on pedestals used to secure the vessel's deck cranes. At trial, Akermanis contended that the defendant's negligence caused him to injure himself while working on these pedestals. Although there was conflicting evidence, Akermanis testified that on June 4, 1977, his superiors instructed him to work on the deck burning off a rusted pedestal bracket, despite rolling seas and a deck slippery from the ocean's spray. According to the plaintiff, as a result of these unsafe working conditions, he lost his balance, hit his head against the pedestal, and hurt his back when his head was snapped backwards as he fell. The accident was said to have severely injured Akermanis' cervical spine and forced his early retirement from the merchant marine.

Sea-Land Service contested almost all of Akermanis' allegations. First, Sea-Land claimed that Akermanis' injuries stemmed not from an accident aboard the Los Angeles, but rather from several preexisting ailments. Second, Sea-Land contended that it was in no way to blame for the condition of the Los Angeles on June 4, 1977, that Akermanis had not been ordered to work on the pedestal bracket at any particular time, and that any risks Akermanis faced while working on the deck were inherent in the life of a seaman. In addition, Sea-Land raised the defense of contributory negligence, arguing that, if working on the pedestal was unsafe, Akermanis, who was 59

years old and had 30 years of maritime experience at the time of the accident, should have been able to appreciate the danger and rearrange his schedule to work below deck until the weather cleared. According to the defendant, Akermanis had considerable discretion in scheduling his work. Moreover, counsel for Sea-Land suggested that the alleged accident was more likely the result of Akermanis' carelessness in doing his job than any fault of the defendant. Finally, Sea-Land introduced evidence through a series of expert witnesses that contradicted the testimony of Akermanis' doctors as to the extent and cause of his spinal injuries.

In response to a special verdict form, the jury found that Sea-Land was negligent, that its negligence was a proximate cause of Akermanis' June 4, 1977, accident, and that as a result of the accident, Akermanis suffered damages totaling \$528,000. The jury further found that Akermanis also was negligent and that the share of responsibility attributable to his negligence was four percent.

Following the jury's verdict, Sea-Land moved for judgment notwithstanding the verdict or, in the alternative, for a new trial, pursuant to Fed. R. Civ. P. 50(b). After reviewing the record, Judge Haight concluded that there was sufficient evidence to support the jury's findings that negligence on the part of the defendant caused the plaintiff's injuries. Because it was not "clear that the jury had reached a seriously erroneous result," *Bevevino v. M.S. Saydjari*, 574 F.2d 676, 684 (2d Cir. 1978) (quoting 6A *Moore's Federal Practice* ¶ 59.08[5], at 59-160 to —161 (1973)), the District Court denied defendant's motion for judgment notwithstanding the verdict [sic], see *Berner v. British Commonwealth Pacific Airlines, Ltd.*, 346 F.2d 532, 538 (2d Cir. 1965) (evidence must be viewed most favorably for the defendant on j.n.o.v. motion), *cert. denied*, 382 U.S. 983, 86 S.Ct. 559, 15 L.Ed.2d 472 (1966), and declined to order a new trial of all the issues.

Judge Haight then considered the jury's finding that plaintiff's contributory negligence was a four percent cause of the accident, and concluded that the selection of this percentage was against the weight of the evidence, in his view a "clear and

serious error." While he agreed that it was reasonable for the jury to determine that Sea-Land's negligence was the major cause of the accident, he rejected four percent as the measure of plaintiff's share of responsibility. His reasoning is set forth in his memorandum opinion. He first assumed that the jury's finding of plaintiff's contributory negligence was based on their acceptance of defendant's evidence that Akermanis had some discretion to determine when he would work on the ship's pedestals and had exercised that discretion without using reasonable care. Judge Haight then determined that a factor of only four percent for contributory negligence of this sort was against the weight of the evidence and so substantially below jury determinations in similar Jones Act cases as to warrant a new trial. After referring to cases cited at 44A *Modern Federal Practice Digest Seamen* § 29(4)(H) (West 1968), he concluded that the lowest contributory negligence factor the evidence would support was 25 percent. He therefore ordered a new trial on liability issues, but with the condition that the defendant's motion for new trial would be denied if the plaintiff would accept a "remittitur" of damages based on an increase of the contributory negligence factor from four to 25 percent. The plaintiff accepted, and judgment was entered in favor of the plaintiff for 75% of the jury's determination of the total amount of damages suffered.

I.

We consider first Sea-Land's appeal, which challenges the District Court's authority to use the device of a remittitur to adjust the jury's determination of the contributory negligence percentage. Remittitur is a limited exception to the sanctity of jury fact-finding. It allows trial judges to reduce damages, but only when an award is grossly excessive. As the Supreme Court has stated, this exception is justified because, "[w]here the verdict is excessive, the practice of substituting a remission of the excess for a new trial is not without plausible support in the view that what remains is included in the verdict along with the unlawful excess—in that sense that it has been found by the jury—and that the remittitur has the effect of merely lopping

off an excrescence," *Dimick v. Schiedt*, 293 U.S. 474, 486, 55 S.Ct. 296, 301, 79 L.Ed. 603 (1935). But in *Dimick*, the Supreme Court made clear that remittitur was not an expansive doctrine: "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Id.*

In giving that scrutiny to the use of remittitur in this case, we note a fundamental difference between the use of remittitur to decrease a determination of damages and its use here to increase a contributory negligence percentage. Though both have the same ultimate consequence of reducing the amount of the judgment that the plaintiff is invited to accept as the price of avoiding a new trial, the means by which the reduction is accomplished differ in a way that is critical to determining the lawfulness of the technique. A conditional reduction of a damage calculation leaves in the judgment a portion of what the jury awarded, a circumstance that the Supreme Court considered crucial to its willingness to permit remittitur while rejecting additur in *Dimick*. In this case, however, the conditional adjustment of the contributory negligence percentage inserts into the judgment something beyond what the jury found: a conclusion that the plaintiff's negligence was responsible for a greater share of the accident than the jury had thought. In *Dimick*, the four dissenters thought it was needlessly artificial to deny a trial judge the authority to condition a new trial order on payment of an additur while permitting him to use the device of remittitur. In either circumstance, they argued, the judge is simple conditioning the new trial order on the minimum adjustment necessary to render the verdict within the bounds of reasonableness. But their view did not prevail. We are therefore obliged to apply the rationale of the *Dimick* majority, which, as we understand it, precludes any adjustment that extends a jury's finding, even if that extension results in a reduced monetary judgment.¹

1 It could be argued that the type of remittitur permitted by Judge Haight should be allowed since the increase in the contributory negligence factor can be accomplished only with the consent of the plaintiff, whose

We have located only one case in which a trial court attempted to use the remittitur device to adjust a jury's contributory negligence assessment, and that decision did not survive appellate review. In *Ferguson v. Chester A. Poling, Inc.*, 285 N.Y.S. 340, 247 A.D. 727 (2d Dep't 1936) (per curiam), also a Jones Act case, the jury found that the plaintiff had suffered damages of \$25,000, and then reduced this sum by \$5,000 because the plaintiff's contributory negligence was a 20 percent cause of the accident. The trial court thought the lowest reasonable contributory negligence factor was 60 percent and therefore ordered a new trial unless the plaintiff agreed to a reduction in the judgment from \$20,000 to \$10,000. The Appellate Division reversed because "the question of apportioning the negligence was peculiarly within the province of the jury." *Id.* at 341, 247 A.D. at 728. We agree with the New York court that a jury's apportionment of responsibility in a Jones Act case is not subject to adjustment by the device of a remittitur. In *Ferguson* the Appellate Division ordered judgment upon the jury's fact-finding. Whether that result or a new trial is warranted here requires consideration of plaintiff's cross-appeal.

II.

A. In considering the plaintiff's cross-appeal, we face the threshold issue of whether we have appellate jurisdiction. This Circuit has followed the majority rule that a plaintiff who accepts a remittitur may not appeal from a judgment entered upon the reduced award. *Donovan v. Penn Shipping Co.*, 536 F.2d 536 (2d Cir. 1976), *aff'd per curiam*, 429 U.S. 648, 97 S.Ct. 835, 51 L.Ed. 2d 112 (1977); *Evans v. Calmar Steamship*

share of fault is being enlarged. However, it was equally true in *Dimick* that the increase in the amount of damages sought to be achieved by the use of additur could have been accomplished only with the consent of the defendant, who would have paid the increase. The Supreme Court's rejection of additur, indeed, its grudging acceptance of remittitur, 293 U.S. at 484, 55 S.Ct. at 300, suggests that jury determinations are not to be enlarged upon, even with the consent of the party thereby disadvantaged.

Co., 534 F.2d 519 (2d Cir. 1976). And we have also dismissed the cross-appeal of a plaintiff who accepted a remittitur, even though we adjudicated the merits of the defendant's appeal from the judgment entered upon the reduced award. *Mattox v. News Syndicate Co.*, 176 F.2d 897, 904 (2d Cir.) cert. denied, 338 U.S. 858, 70 S.Ct. 100, 94 L.Ed. 325 (1949). But see *Burris v. American Chicle Co.*, 120 F.2d 218, 223 (2d Cir. 1941) (questioning appealability but reaching merits of cross-appeal). That rule, whatever its merit, see *Donovan v. Penn Shipping Co.*, *supra*, 536 F.2d at 538 (Feinberg J. (now C.J.), dissenting); *Reinertsen v. George W. Rogers Construction Corp.*, 519 F.2d 531 (2d Cir. 1975), does not necessarily preclude our exercise of jurisdiction over Akermanis' cross-appeal. The rationale of *Donovan v. Penn Shipping Co.*, *supra*, appears to be two-fold: waiver and efficiency. The plaintiff who has accepted a remittitur, even if the acceptance was under protest, will not be heard to complain, and allowance of such appeals would add to the burdens of courts.

Neither rationale applies here. Now that we have adjudicated Sea-Land's appeal and agreed with appellant that the District Judge lacked the power to condition the new trial order on a remittitur adjusting the contributory negligence percentage, the first step in ordering relief with respect to the appeal is, as Sea-Land requests, to vacate the judgment entered upon the reduced award on the ground that its entry was erroneous. Once we do that, it is conceptually difficult and practically unfair to think of the plaintiff as having waived a cross-appeal by consenting to a judgment that no longer exists. The rationale of court efficiency does not disappear, but it becomes less persuasive. Normally, when an appellate court dismisses the appeal or cross-appeal of a plaintiff who has accepted a remittitur, the burden on the court system is reduced because there will be neither an appeal nor a new trial. That is not true in this case. If we dismiss the cross-appeal and simply return the case to the District Court for a new trial, now that the conditional aspect of the new trial order has been excised, there would clearly be less of a burden on this Court. But that course would add considerably to the burden on the District

Court, which would have to conduct a trial that the cross-appellant is prepared now to show us should never have been ordered. What we really face is an issue that has nothing to do with acceptance of a remittitur: whether a cross-appeal will lie as to a non-final order for a new trial when the main appeal from a final judgment has already brought the case to an appellate court.

That is similar to the situation that arises under Fed. R. Civ. P. 50(c) when a trial court grants a motion for judgment n.o.v. and also, as required by Rule 50(c), conditionally grants a motion for a new trial. Upon appeal of the judgment by the party that wants judgment entered on the verdict, Rule 50(c) provides that if the judgment is reversed, "the new trial shall proceed unless the appellate court has otherwise ordered." This provision, which the Advisory Committee explains was not intended to alter the scope of appellate review, *see* Fed. R. Civ. P. 50 advisory committee note, contemplates that an appellate court, after vacating the judgment n.o.v., may then review the trial court's ruling conditionally granting a new trial and "otherwise order[]" that the new trial not be held. The result is review of a new trial order that would not have been appealable, if not accompanied by the granting of a motion for judgment n.o.v., until entry of judgment after retrial. *See Taylor v. Washington Terminal Co.*, 409 F.2d 145 (D.C. Cir.), *cert. denied*, 396 U.S. 835, 90 S.Ct. 93, 24 L.Ed.2d 85 (1969). Even more analogous is the procedure authorized by Rule 50(d), which applies when appeal is taken by a party whose motion for judgment n.o.v. was denied. If that party prevails on its appeal from the judgment entered upon the verdict, the appellee is entitled to urge the court of appeals to order a new trial, rather than order the entry of judgment n.o.v. *See Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 329, 87 S.Ct. 1072, 1080, 18 L.Ed.2d 75 (1967) (making clear that court of appeals can consider the new trial request apart from the authority of Rule 50(d)). Our case is an amalgam of the situations contemplated by Rules 50(c) and 50(d): like the 50(c) appellant, Akermanis wants to be heard in opposition to the trial court's grant of a new trial, but he is not the party who

appealed the judgment; like the 50(d) appellee, he is the adversary of the party who appealed the judgment, but he is opposing, rather than supporting, an order for a new trial.

The situations contemplated by Rules 50(c) and 50(d) are variations of the general authority of a court of appeals, upon vacating a judgment, to "require such further proceedings to be had as may be just under the circumstances." 28 U.S.C. § 2106 (1976). The circumstances of this case are unusual, to say the least. We need not and do not consider the full range of otherwise interlocutory rulings that an appellee would like to urge an appellate court to consider upon his adversary's successful appeal from a final judgment. But we think it is entirely appropriate to entertain the cross-appeal in this case. Doing so is in keeping with the spirit of Rules 50(c) and 50(d) and, as will be seen in Part II(B), *infra*, affords us the opportunity to focus the District Court's attention on matters that may obviate the need for a new trial or at least limit its scope. We therefore turn to the cross-appeal.

B. In granting the defendant's motion for a new trial, Judge Haight reasoned that the jury's finding of contributory negligence was based on a conclusion that Akermanis had the authority to schedule his own work and that he exercised poor judgment by agreeing to work on the Los Angeles' deck on June 4, 1977, when he might have deferred the task to another day.² If that was the jury's conclusion, then, based on the evidence presented at trial, Judge Haight was acting within his broad discretion in ruling that a finding of only four percent contributory negligence was against the weight of the evidence and that a new trial should be granted.³

2 As the District Court correctly noted, under the Jones Act, negligence requires more than knowledge of a hazard; it entails failure to adopt safer alternative courses of action. See *Tolar v. Kinsman Marine Transit Co.*, 618 F.2d 1193, 1196 (6th Cir. 1980); *Rivera v. Farrell Lines, Ltd.*, 474 F.2d 255, 257-58 (2d Cir.), cert. denied, 414 U.S. 822, 94 S.Ct. 122, 38 L.Ed.2d 55 (1973). Inquiry at the trial properly centered on what choices were available to Akermanis and how he exercised those choices.

3 Indeed, if the jury thought that Akermanis was negligent in electing to do his work at the time of the accident, there is at least a superficial

It is possible, however, that the jury's finding of contributory negligence was not based on a conclusion that Akermanis chose to work on the pedestal that day. The jury might have concluded that Akermanis was directed to work on the pedestal at the time of the accident, but that he was negligent in the manner in which he performed his work. During cross-examination, Akermanis admitted that his own preoccupation with burning the bracket might have contributed to the accident.⁴ During his summation, counsel for the defendant reviewed the events surrounding Akermanis' accident "was something due to, perhaps, a momentary lapse of carefulness on his part." If the jury was focusing on the plaintiff's manner of working at the time of the accident, it is arguable that they considered Akermanis' work performance to be negligent but that such negligence represented only a slight percentage of the cause of the accident. In his memorandum opinion, Judge Haight gave no explicit consideration to this possible explanation for the jury's contributory negligence factor of four percent.

Ordinarily, we might not be so concerned that a trial judge explicitly consider every possible justification for a jury's

inconsistency with the finding that the defendant was negligent in ordering him to do the work at that time. But inconsistency is not inevitable. The jury may have thought that the defendant had negligently instructed him to work at that time, but not in the form of such an absolute order as to preclude Akermanis from exercising care in deciding whether to do the work or at least whether to call to his superiors' attention the risks of doing the work at that time. In any event, it is a function of the comparative negligence doctrine to permit the jury to reconcile conflicting versions of an episode.

4 Akermanis' testimony on cross-examination included the following:

Q. Sir, in fact, do you know why your foot came off the pedestal?

A. Because it was wet or the sea—the ship slightly rolling just plain slip.

.....

Q. You don't know why?

A. Why? It could be the ship's rolling. I don't know why.

Q. Sir—

A. *I was concentrating on my work, right. I was interested to cut off that thing. I didn't watch my foot.* The foot was standing there. I slipped while I working and the ship moved, the foot slipped. That's why I say I don't know why [emphasis added].

verdict before concluding that a verdict is against the weight of the evidence and ordering a new trial. But this case arises under the Jones Act, and jury findings under that Act, which incorporates standards of the FELA, are particularly resistant to being overturned. *See Morgan v. Consolidated Rail Corp.*, 509 F.Supp. 281, 285 (S.D.N.Y. 1980). Because we recognize that a trial judge, with a "feel" of the case, *Neely v. Martin K. Eby Construction Co.*, *supra*, 386 U.S. at 325, 87 S.Ct. at 1078, is normally in the best position to determine whether a verdict is against the weight of the evidence, we prefer to have Judge Haight consider whether the "work performance" theory of contributory negligence finds enough support in the evidence, assessed in the context of the entire trial, to justify the four percent factor. If he concludes it does not, then his order for a new trial will stand. Even if he concludes that the "work performance" theory alone would support a four percent factor, then Judge Haight will have the option of either entering judgment for the plaintiff on the jury's damage computation, reduced by only four percent, or ordering a new trial. This latter option remains a possibility because of an intimation in Judge Haight's opinion that he thinks the jury would have committed serious error if they had not attributed at least part of the responsibility for the accident to Akermanis for continuing to work on deck despite the inclement weather and unsafe conditions. In other words, Judge Haight may find that the "work-performance" theory justifies a four percent factor, but that Akermanis' negligence in continuing to work is so strongly supported by the evidence that a verdict assessing his share of fault at only four percent is against the weight of the evidence, whether or not the jury based its findings of contributory negligence on the "continuing-to-work" theory. In short, the District Judge, upon remand, has discretion whether or not to order a new trial.

If the District Court decides that a new trial is necessary to determine the extent of Akermanis' contributory negligence, there will remain a question as to the proper scope of the retrial. Rule 59(a) permits partial retrial of distinct issues but the trial court must examine whether a jury's award of dam-

ages and its finding of liability are sufficiently separate to allow a partial new trial as to liability issues. See *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 500, 51 S.Ct. 513, 515, 75 L.Ed. 1188 (1931) (Partial retrial "may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from others that a trial of it alone may be had without injustice."). In its memorandum opinion, the District Court indicated that, if a new trial were necessary, it would be limited to questions of liability. Defendant contends that any retrial should include redetermination of damages since the jury might have perceived comparative negligence as closely related to damages and might have allowed its determination of damages to be influenced by its erroneous finding of relative fault.⁵

Courts have been reluctant to hold a new trial on contributory negligence without also retrying damages. See *Rivera v. Farrell Lines, Inc.*, 474 F.2d 255, 259 (2d Cir.) (Jones Act case), cert. denied, 414 U.S. 822, 94 S.Ct. 122, 38 L.Ed.2d 55 (1973); cf. *Norfolk Southern Railroad Co. v. Ferebee*, 238 U.S. 269, 273 35 S.Ct. 781, 782, 59 L.Ed. 1303 (1915) (it would rarely be proper to allow a jury to consider a question of damages without also submitting the issue of contributory negligence). But this reluctance has been expressed in cases like *Rivera*, where the form of the jury verdict left the court "in the dark as to what the total award would have been absent the finding of contributory negligence and the extent to which that finding affected the verdict." *Rivera, supra*, 474 F.2d at 259. The jury in that case had reported a finding of contributory negligence, but had not been asked to report the percent of responsibility it

5 While it is understandable that the defendant would prefer a second opportunity to persuade a jury to return a modest damage award, the logic of the argument is unclear: if the jury had determined the amount of damages in relation to their contributory negligence percentage, the setting of a low percentage would indicate that, if anything, damages had been scaled down from what they might have been had the contributory negligence factor been high. In this circumstance, it would normally be the plaintiff, not the defendant, who might have a claim that damages should be retried in the event of a retrial as to contributory negligence.

attributed to plaintiff's contributory negligence. However, when a jury arrives at its decision by detailed special verdicts, enabling a trial or a reviewing court to be reasonably certain that an erroneous verdict was reached independent of another verdict, a partial retrial may be in order. See, e.g., *Ferebee, supra*.

In this case, a new trial, if one is held, need not reconsider damages. Because Judge Haight submitted detailed interrogatories to the jury, following substantially the form suggested in *Rivera, supra*, 474 F.2d at 259 n. 5, we know the jury's determination of aggregate damages suffered by the plaintiff, as well as their view of how much of a discount should be applied because of contributory negligence. Armed with these specific findings, the District Court acted within its discretion in excluding the issue of damages from retrial. Cf. *Landry v. Two R. Drilling Co.*, 511 F.2d 138, 143 n. 4 (5th Cir. 1975) (court accepted 20% contributory negligence factor from first trial and limited retrial to question of damages). Although it is possible that the jury's special verdicts encompassed some undisclosed compromise, absent obvious inconsistencies we will not presume that the jury's findings represent anything other than good faith responses to the questions presented. As Judge Haight has already determined that the jury's determination of damages is supported by the evidence, we conclude that damages need not be reconsidered at retrial.

In his opinion conditionally ordering a new trial, Judge Haight indicated that the defendant is entitled to a new trial "on the question of contributory negligence," but the operative language of his order grants a new trial "on liability issues." The authority provided by Rule 59(a) for a new trial on "part" of the issues has been used by some courts with precision. E.g., *Higginbotham v. Ford Motor Co.*, 540 F.2d 762 (5th Cir. 1976). If Judge Haight determines that a new trial, if held, should be limited to the question of contributory negligence—both its existence and its percentage—he has discretion to narrow the retrial to that extent.⁶ He might well conclude that

6 If this procedure were used, the jury would be told that defendant's negligence has already been determined and that their task is only to

since the retrial is occasioned because the first jury assigned too great a share of the blame to the defendant, Akermanis should not have to persuade the second jury that the defendant was negligent simply because he had made that demonstration too convincingly to the first jury.⁷ On the other hand, the District Judge also has discretion to retry all the liability issues, if he concludes that a trial limited to contributory negligence would not, on balance, be fair to the parties.

We have considered the other issues raised by the defendant concerning evidentiary rulings and the instructions to the jury and find them to be without merit. Accordingly, the judgment is reversed, and the case remanded for further consideration consistent with this opinion.

determine whether the plaintiff was contributorily negligent and, if so, to determine what percentage of responsibility for the accident is attributable to the plaintiff's contributory negligence. The parties would, of course, be entitled to present all evidence relevant to the fault of both parties in order for the jury to make an apportionment of fault.

7 In some situations, it might be inappropriate to order such a limited partial new trial. For instance, if in this case the jury's contributory negligence factor had been impermissibly high, then any retrial might have to encompass all aspects of liability: it might be unclear from such a verdict whether the jury really thought the defendant was liable or whether their finding of liability coupled with a high assessment of contributory negligence represented a compromise between factions. Similarly, if in this case the jury's award of damages as well as its assessment of contributory negligence had been low, then it might be necessary to afford the plaintiff the option to retry damages as well as liability: the jury might have discounted the damages to compensate for the plaintiff's contributory negligence.

APPENDIX B

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in
and for the Second Circuit, held at the United States Court
House, in the City of New York, on the 28 day of October, one
thousand nine hundred and eighty-two.

No. 81-7833
81-7873

CARL O. AKERMANIS,

Plaintiff-Appellee-Cross-Appellant,

—v.—

SEA-LAND SERVICE, INC.,

Defendant-Appellant-Cross-Appellee.

A petition for rehearing containing a suggestion that the
action be reheard in banc having been filed herein by counsel
for the plaintiff-appellee-cross-appellant, Carl O. Akermanis.

Upon consideration by the panel that heard the appeal, it is
Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk
S/ FRANCIS X. GINDHART
by FRANCIS X. GINDHART
Chief Deputy Clerk

STAMP

United States Court of Appeals, Second Circuit
Filed October 28, 1982
A. Daniel Fusaro, Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
S. D. NEW YORK

Oct. 14, 1981
No. 77 Civ. 6131-CSH

CARL O. AKERMANIS,

Plaintiff,

—v.—

SEA-LAND SERVICE, INC.,

Defendant.

Markowitz & Glanstein, New York City, for plaintiff; Steven Thaler, New York City, of counsel.

Walker & Corsa, New York City, for defendant; Joseph T. Stearns, Sandra R. M. Gluck, New York City, of counsel.

MEMORANDUM OPINION AND ORDER

HAIGHT, District Judge:

Plaintiff Carl Akermanis, a licensed marine engineer, brought this action against his former employer, defendant Sea-Land Service, Inc., to recover for damages allegedly caused by an accidental injury suffered on board defendant's vessel LOS ANGELES on June 4, 1977. The complaint stated causes of action for unseaworthiness, and for negligence under the Jones Act, 46 U.S.C. § 688. The Court dismissed the unseaworthiness claim at the conclusion of plaintiff's case. Defendant's motion to dismiss the negligence cause of action was denied, defendant offered evidence, and that cause of action was submitted to the jury in the form of a special

verdict. The jury found that defendant's negligence was a proximate cause of plaintiff's accident, and assessed damages of \$150,000 for past pain and suffering, \$100,000 for future pain and suffering, \$160,000 for past lost earnings, and \$118,000 for future lost earnings. The damages consequently totalled \$528,000. Finally, the jury found that the contributory negligence of plaintiff contributed to the accident in the amount of 4%.

The Court entered judgment in plaintiff's favor for \$489,514.61. This amount reflected the 4% reduction for contributory negligence, and a 2% discount on future damages, the parties having offered no proof on the relevant economic issues. *Doca v. Marina Mercante Nicaraguense*, 634 F.2d 30, 40 (2d Cir. 1980). The judgment bore interest at 6% per annum.

Defendant now moves pursuant to Rules 50 and 59, F.R.Civ.P., for an order granting defendant judgment n. o. v., or in the alternative a new trial, or in further alternative a remittitur. Plaintiff cross-moves to amend the judgment so as to provide for interest at 9%.

I.

Plaintiff was 59 years old at the time of the alleged accident. He had been going to sea since 1936. After service in the United States Navy, he obtained his first marine engineer's license in 1946, and, until the date of his accident, sailed continuously in the Merchant Marine since that time. He obtained a chief engineer's license in 1957. At the pertinent time, however, plaintiff was sailing on board defendant's vessel LOS ANGELES as a third assistant day engineer, having joined the vessel in that capacity on March 31, 1977.

The theory of plaintiff's case was that, on the morning of June 4, 1977, he was assigned to do burning and "finishing" work on deck. The LOS ANGELES was then on a voyage from Persian Gulf ports through the Mediterranean, bound for Rotterdam. On the date of the accident, she had passed through the Strait of Gibraltar, and was navigating in the North Atlantic. Plaintiff's work consisted of using a torch to burn off

the top of an iron pedestal, containing a deteriorated support bracket for a turnbuckle, which was in turn used to secure one of the movable cranes of the vessel while at sea. Plaintiff contended that the place in which he was working was unreasonably unsafe because the working of the vessel in the seas had wetted the decks with spray, rendering the deck area slippery. (Plaintiff, in his testimony, was not specific about the physical cause of the accident about to be related, but his contention through counsel, articulated throughout the case and advanced with the assistance of expert testimony at the trial, was that wind-blown spray from waves had rendered the deck area hazardous for work.) Plaintiff was working on top of hatch covers near the port edge of the coaming, between the number 9 and 10 hatches. He testified that as he was burning the top of the pedestal with his torch, he lost his balance, struck his head on the pedestal, and that then his head was jerked backwards as he fell. Plaintiff alleged a severe and permanent injury to his cervical spine, resulting in his inability to work again as a merchant seaman.

Defendant's theories of the case were (1) no accident had occurred, rather plaintiff was asserting a pretext to recover damages before retiring; and (2) whatever symptoms plaintiff had suffered, or was suffering from, resulted from other physical conditions and maladies, not related to the alleged accident.

Plaintiff testified at the trial. The chief officer and chief engineer of the vessel testified by deposition. In addition to these lay fact witnesses, there was an extensive amount of medical evidence. The medical evidence took the form of deposition testimony by plaintiff's post-accident treating physician, an orthopedist; hospital records relating to a number of hospitalizations of plaintiff and consequent treatment, both prior and subsequent to the accident; and the usual medical expert witnesses, retained by the parties to give evidence at the trial.

The opposing papers on the present motion rehearse at length the parties' contentions, factual, medical, and legal. In passing upon defendant's motion for judgment n. o. v. under

Rule 50(b), I must view the evidence in the light most favorable to plaintiff. The standard is different on a motion for a new trial under Rule 59; a new trial motion may be granted even if there is substantial evidence to support the jury's verdict, and the trial judge is free to weigh the evidence himself and need not view it in the light most favorable to the verdict winner. *Behevino v. M.S. Saydjari*, 574 F.2d 676, 677, 683-84 (2d Cir. 1978). However, even within the Rule 59 context, the moving party must satisfy the trial judge that the verdict was contrary to the weight of the evidence; and the Second Circuit in *Behevino* specifically approved the standard set forth by a leading commentator that the trial judge should "abstain from interfering with the verdict unless it is quite clear that the jury had reached a seriously erroneous result." *Id.* at 684, quoting *6A Moore's Federal Practice*, ¶ 59.08[5], at 59-160-59-161 (1973).

Implicit in this standard is the rule that "a trial judge should not act merely as a '13th juror' and set a verdict aside simply because he would have reached a different result had he been the trier of fact." *Borras v. Sea Land Service, Inc.*, 586 F.2d 881, 887 (1st Cir. 1978). It has also been said that "courts have long been, and should be especially reluctant to overturn a jury finding of negligence in an F.E.L.A. case." *Morgan v. Consolidated Rail Corp.*, 509 F.Supp. 281, 285 (S.D.N.Y.1980), and cases cited. This last observation is pertinent because Jones Act cases are governed by F.E.L.A. principles.

Viewed in the light of these standards, defendant is not entitled to judgment n. o. v., or, with the exception of the contributory negligence issue discussed under Point II *infra*, to a new trial. The accident either occurred or it did not. Defendant argued that the evidence showed plaintiff did not report the incident, and that he had attained the level of full retirement benefits, from which defendant asked the jury to infer that plaintiff had invented the accident in order to finance a more comfortable retirement. The jury was entitled in law to draw that inference; but it was equally entitled to believe the plaintiff's account of what happened to him, as it clearly did. I do not regard the jury's conclusion as seriously erroneous.

Having observed plaintiff's demeanor and listened to his testimony, I do not believe that he fabricated the accident.

On the question of defendant's negligence, plaintiff's expert witness testified that the prevailing conditions of wave, wind, and the vessel's motion through the seas resulted in spray on the deck which rendered the area unsafe for the designated work. Plaintiff testified that the chief engineer directed him to perform the work. The chief officer's duties included supervision of work on deck with a view to safety. There is no basis, under either rule, to disturb the jury's finding that defendant's negligence contributed to the accident.

Finally, the jury was entitled to conclude, from the mass of medical evidence, that the accident caused an injury to plaintiff's cervical spine, permanent in nature, which, when superimposed upon whatever prior conditions plaintiff suffered from, constituted the cause of a permanent disability to work as a marine engineer. The Public Health Service treating physician, Dr. Miller, during the course of a lengthy deposition, gave such testimony (Dep. Tr. 87, 88, 95, 96); a comparable opinion was expressed by plaintiff's trial expert, Dr. Golub, who attached particular significance to a reversal of the upper cervical curve which he detected in the x-rays.

There was, of course, contrary evidence from the two medical expert witnesses defendant called at trial. The jury could have accepted those opinions; it could also have drawn certain of the inferences which defendant's counsel asked it to draw from plaintiff's voluminous medical history. But again, the jury elected not to do so; and it is a necessary function of lay jurors to choose between conflicting medical opinion. In addition, the jury was entitled to consider the fact, stressed by plaintiff's counsel in argument, that notwithstanding the previously existing conditions stressed by defendant, plaintiff had worked without significant interruption at sea for many years prior to the accident in suit. Defendant's riposte, as previously noted, was that plaintiff had decided it was time to retire, and wished to augment his pension. But the jury was also entitled to credit plaintiff's testimony—as did I—when, in responding to that suggestion by defendant's counsel on cross-examina-

tion, he stated in substance that he loved the sea, it was his home, he knew no other, he had not intended to retire, and badly missed going to sea.

These considerations are fatal to defendant's motion for judgment n. o. v. under Rule 50, on the questions of liability and causation discussed. Within the context of defendant's motion for a new trial under Rule 59, I could disturb the jury's findings on these issues only if I acted as an impermissible "13th juror," which I decline to do, because I am not persuaded that they were "seriously erroneous."

II.

The question of substance that arises, on this aspect of the motion, relates to the jury's finding of 4% contributory negligence. As noted *supra*, there is no basis for disturbing the jury's findings that the area in which plaintiff was working was unsafe by reason of spray on the deck, and that defendant's supervising officers, who directed plaintiff to perform this work, knew or should have known of the hazard. But defendant argued that plaintiff, a man of many years' experience at sea, and the holder of a chief engineer's license, was equally able to appreciate any danger, and that he could have, by an alternative course of conduct, avoided the danger.

To sustain a theory of contributory negligence, defendant was required to demonstrate something more than plaintiff's proceeding in the face of an apparent hazard. A theory of negligence, so limited, is the legal equivalent of the defense of assumption of the risk, which is not available in cases of this nature. *Rivera v. Farrell Lines, Inc.*, 474 F.2d 255, 257-58 (2d Cir. 1973). It is necessary for the defendant to demonstrate "an act of negligence other than [plaintiff's] knowledge of the dangerous condition," such as a failure to take an alternate route which would have avoided the hazard. *Id.* at 258. That is to say, "the defense of contributory negligence requires evidence of some negligent act or omission by the plaintiff other than his knowledgeable acceptance of a dangerous condition." *Tolar v. Kinsman Marine Transit Co.*, 618 F.2d 1193 (6th Cir. 1980), citing *Rivera*, *supra*. "A seaman may not be denied

recovery because he proceeds in an unsafe area of the ship or uses an unsafe appliance in absence of a showing that there was a safe alternative available to him." *Tolar* at 1195.

In the case at bar, defendant perceives the requisite safe alternative in plaintiff's testimony that the project of replacing the on-deck fittings had been going on for a period of a week, ten days, possibly longer than that; that plaintiff had been preparing some of the replacement fittings while the vessel was in the Mediterranean; and that the weather in the Mediterranean "was real beautiful then." It further appears from the evidence that plaintiff, while given a number of projects as assistant day engineer, exercised a considerable degree of personal control as to which project he would work upon at what time. It is further established from the evidence that the accident occurred on a Saturday, which was an overtime day, and that plaintiff was not required to work on that day at all, unless he wished to accrue overtime. From these facts, essentially undisputed, defendant argues that plaintiff could have performed this work while the vessel was still sailing in the beautiful weather of the relatively sheltered Mediterranean; or, the vessel having progressed into the North Atlantic, he could have deferred the work until a different time if the weather conditions at a given moment created a hazardous condition. This theory finds arguable support in the following testimony given by the plaintiff on cross-examination:

"Q. This project of cutting off and replacing these pedestal supports was an ongoing thing, correct?" "A. Yes."

"Q. It had been going on for a period of time, perhaps a week, ten days, maybe more?" "A. Right."

"Q. You were doing that when it was convenient and you were doing other things when it was convenient and you were doing the routine things one after the other as you chose, correct?"

"MR. THALER: I object to form."

"THE COURT: Overruled."

"MR. THALER: Okay."

"Q. As you chose?" "A. Like, working those pedestals, when it was good weather, I could cut all those gadgets off, get ready to weld these new parts over it, because they had already made three or four of them. I don't know who made them. I could put those on in good weather and when it was bad weather I could—they didn't take long to make it. You don't have to work for days. I could make four, five in one day or maybe six, maybe all eight." Tr. 28-29.

Against this record, the Court charged the jury, without exception, on the issue of contributory negligence in pertinent part as follows:

"In this case, in order to establish that the plaintiff was negligent, the defendant must prove an act of negligence other than the plaintiff's knowledge of a dangerous condition in the area of his work. That is because under the law, the plaintiff did not assume the risk of his employment. That is, he does not under the law assume the risk of a negligently created condition.

"But the plaintiff was under a duty to make reasonable use of his own senses, in order to avoid injury to himself. In that regard, you must consider the defendant's argument that Mr. Akermanis could have arranged his work schedule so as to complete this particular burning and welding project while the vessel was in calmer waters, earlier in the voyage, before passing through the straits of Gibraltar into the North Atlantic."

The jury, so instructed and in the light of this evidence, answered in the affirmative the following question on the special verdict:

"5. Has defendant proved, by a fair preponderance of the credible evidence, that there was any contributory fault of plaintiff Carl Akermanis, which proximately caused his accident?"

And, having answered that question in the affirmative, the jury assessed the percentage of contribution of the plaintiff's own fault to the accident at 4%, leaving the remaining 96% to fall upon defendant.

If the jury had concluded that plaintiff was free of contributory negligence, a question of some difficulty might have arisen as to whether that conclusion was not only erroneous, but "seriously" so. However, the jury by its verdict has voiced its conclusion that, in fact, fault of the plaintiff contributed to his accident. In the circumstances of this case, I have no difficulty at all in concluding that the minimal percentage assigned to that fault constitutes clear and serious error.

Defendant argues that a finding of 4% contributory negligence is, in the circumstances, "unsupportable." Main brief at 16. Defendant cites no case for this proposition, or to indicate what a proper allocation should be. But I am persuaded, on the basis of my own research, that the general proposition is sound, and that a significant increase in the degree of contributory negligence is required to prevent a miscarriage of justice. The subjects of "assumption of risk, contributory negligence, and division of damages" are treated in West's Federal Practice Digest under "Seamen," key number 29(4). Examination of the headnotes indicates that, in cases where judge or jury have found contributory negligence on the part of the plaintiff, the allocated percentages fall for the most part between 20% and 50%. Of course, each case turns upon its own circumstances; but this trend of decision reflects a general awareness that if a seaman's negligence contributed to his shipboard injury, it did so to a significant degree.

While I find no precedent for so minimal an allocation in a case where a seaman's negligence has contributed to his own injury, I do not hold that a 4% allocation for contributory negligence can never be appropriate. But I do conclude that, in the circumstances of this case, it cannot be. As defendant accurately states in its brief at 16, this is a case "in which plaintiff was working voluntarily on overtime and in which he admitted that he exercised discretion as to when and how he

would perform this routine task." No compulsion to do this work at this time appears. Plaintiff could have reasonably foreseen that it would be safer to do burning and finishing work on an exposed deck in the Mediterranean rather than the North Atlantic. In somewhat comparable circumstances judges sitting without juries have found 50% contributory negligence factors. See, e. g., *Nygaard v. Peter Pan Seafoods, Inc.*, 508 F.Supp. 151, 154 (W.D.Wash.1981), per Senior District Judge Beeks; *Haughton v. Blackships, Inc.*, 334 F.Supp. 317 (S.D.Tex.1971), *rev'd on other grounds*, 462 F.2d 788 (5th Cir. 1972).

In the case at bar, the jury clearly indicated its view that a considerably greater share of fault should be allocated to the defendant shipowner. In reaching that conclusion, the jury presumably had in mind plaintiff's testimony that the chief engineer instructed him to work on deck on the day in question, testimony which permitted plaintiff's counsel to argue in summation that, under the adverse weather conditions prevailing, and notwithstanding plaintiff's option to do something else that morning, "the assignment should never have been given" by the chief engineer, and that the chief officer should not have permitted plaintiff to continue in his work. Tr. 68. While I regard the jury's precise assessed percentages as impermissible, it is entitled to place the greater share of the fault upon defendant. My view on this aspect of the case is that, in the totality of circumstances, a contributory negligence allocation of only 4% is seriously erroneous; and that defendant is entitled to a new trial on liability issues, unless plaintiff agrees to a remittitur of the damages awarded, based upon a contributory negligence factor of 25%. The procedure that will be followed in the event of a new trial is discussed under Point VI *infra*.

III.

Defendant contends that the jury's awards of damages are excessive. Consistent with preferred practice, cf. *Gretchen v. United States*, 618 F.2d 177, 180-81 (2d Cir. 1980), the jury

completed a special verdict calculating separate amounts for past and future loss of earnings, and past and future pain and suffering. Defendant challenges each award.

In passing upon a motion challenging a jury's verdict as excessive, "the trial judge is not called upon to say whether the amount is higher than he personally would have awarded," *Dagnello v. Long Island Railroad*, 289 F.2d 797, 806 (2d Cir. 1961), citing with approval *Delaney v. New York Cent. R. Co.*, 68 F.Supp. 70 (S.D.N.Y.1946), and *Lopoczyk v. Chester A. Poling, Inc.*, 60 F.Supp. 839 (S.D.N.Y.), *aff'd*, 152 F.2d 457 (2d Cir. 1945). In *Delaney*, this Court said:

"Even though I might disagree with the amount of the verdict, I have no right to substitute my mind for that of the jury. A verdict will not be set aside simply because it is excessive in the mind of the Court, but only when it is so grossly excessive as to shock the Court's sense of justice and the impropriety of allowing it to stand is manifest." 68 F.Supp. at 73.

Lopoczyk, supra, expands on the theme in these words:

"It is familiar learning that the court should not set aside a verdict on the ground that it is excessive unless it is so high as to shock the conscience. This rule is to be applied even where there is some feeling on the part of the trial court that a smaller verdict would have been more appropriate . . . The principle is that if the court should set aside the jury's verdict in the absence of a showing of caprice, passion or prejudice, it would be usurping the jury's function . . . The power to set aside should be cautiously used because where pain and suffering and permanent injury are involved there can be no exact yardstick and the jury's determination should stand unless it is clearly unreasonable." 60 F.Supp. at 840 (citations omitted).

At the appellate court level, the standard of review is essentially the same. See, e. g., *Mileski v. Long Island Rail-*

road, 499 F.2d 1169, 1173 (2d Cir. 1974) (" . . . we cannot say that this award was so grossly excessive or shocking to the conscience that it would be a 'denial of justice to let it stand,' " citing *Dagnello, supra*, and *Grunenthal v. Long Island Railroad*, 393 U.S. 156, 159, 89 S.Ct. 331, 333, 21 L.Ed.2d 309 (1968)); *Gibbs v. United States*, 599 F.2d 36, 39 (2d Cir. 1979); *Zarcone v. Perry*, 572 F.2d 52, 56-57 (2d Cir. 1978); *Fernandez v. Chios Shipping Co., Ltd.*, 542 F.2d 145, 155 (2d Cir. 1976) (" . . . although the jury's verdict for the longshoreman was generous, it was not so excessive as to shock the court's conscience"); *Vaccaro v. Alcoa Steamship Co.*, 405 F.2d 1133, 1139 (2d Cir. 1968).

The jury's award of lost earnings will stand if there is evidence in the record to support it. *Grunenthal v. Long Island Railroad, supra*, 393 U.S. at 160, 89 S.Ct. at 333; *Williamson v. Compania Anonima Venezolana de Navigacion*, 446 F.2d 1339, 1342 (2d Cir. 1971). An award for pain and suffering, necessarily depending upon less precise measures of calculation, will not be disturbed unless so grossly excessive as to shock the conscience and to constitute a denial of justice. *Mileski, supra*, and other cases cited.

Judged by these standards of review, the present jury's awards are invulnerable to challenge. The amounts for past and future lost earnings find adequate support in the record. As noted under Point I, *supra*, I decline to disturb the jury's findings that, as the result of the defendant's negligence, plaintiff suffered permanent injury which terminated a career at sea he would otherwise have continued. Plaintiff became disabled in June, 1977, at age 59. He called as a witness Daniel Colon, a union official, who testified without contradiction that the mandatory retirement age for merchant marine engineers was 70, and that berths had been and remained available on American flag vessels. Because of industrial retooling, plaintiff would probably have had to upgrade his license from steam to diesel in order to secure continued employment; but he testified that it had been his intention to do so, and the jury was entitled to believe him. The jury awarded plaintiff \$160,000 for past lost earnings (1977-1981), and \$118,000 for

future lost earnings (post-1981), for a total of \$278,000. The amounts plaintiff would have earned under the union contract were established by Colon's testimony. Taking into account the increases in wages called for by the union contract, and reasonably predictable overtime based upon plaintiff's past performance, plaintiff would have earned \$225,336.62 during the period 1977 through 1983 under a steam license and \$280,870.28 if he had obtained a diesel license. Thus the total amount awarded by the jury is supported by the evidence of what he would have earned, had he continued to sail through age 66. The jury evidently declined to award future lost earnings beyond that age although, as noted, plaintiff would not have been required to retire until he was 70. The awards for lost earnings, being supported by evidence in the record, will not be disturbed.¹

The jury also awarded plaintiff \$150,000 for past pain and suffering, and \$100,000 for future pain and suffering, making a total of \$250,000 under this general heading. The total award is undoubtedly generous. I might well have awarded a lower figure. Neither of these factors, under the controlling authorities, is of legal significance. The case concerns jury findings of permanent and debilitating back pain, which put an end to the career of a man who loved the sea. The award for pain and suffering is not of a magnitude to shock the Court's conscience, or amount to a denial of justice.

In short, I deny the motion for a new trial or remittitur based upon the asserted excessiveness of the damages awarded.²

1 Defendant argues that a series of post-accident hospitalizations, unrelated to the accident, would necessarily have prevented plaintiff from earning wages in an amount equal to the jury's award. But the hospitalizations were of relatively brief duration, and, in view of the undisputed evidence concerning the amount of shoreside vacation plaintiff received each year under the union contract, would not necessarily have interrupted his earnings.

2 Defendant complains that the jury adopted the figures suggested by plaintiff's counsel in summation. As for lost earnings, counsel based his

IV.

As an alternative basis for relief, defendant contends that improprieties of plaintiff's counsel during summation inflamed the passion and prejudice of the jury, thereby depriving defendant of a fair trial.

While defendant's counsel is generally critical of his adversary, only two comments made by plaintiff's counsel during summation require discussion. The first involves what defendant regards as an unfair imputation of perjury to defendant's witnesses. The issue arises in this manner. Chief Officer Moulton of the LOS ANGELES testified by deposition that, in a conversation with Chief Engineer Carver of that vessel on April 1, 1977, the day after plaintiff joined the vessel for the voyage in question, Carver told Moulton that "whenever he asked Mr. Akermanis to perform a task requiring responsibility, Mr. Akermanis tended to become ill."³ Defendant relied upon this testimony in urging that a wave of dizziness which plaintiff testified he suffered several days after the accident was not causally related to the accident. In order to rebut this theory, plaintiff's counsel relied upon the following testimony given by Chief Engineer Carver at his deposition:

calculations on the record evidence, which as noted *supra* was sufficient to sustain them. On pain and suffering, counsel said:

"We ask you to consider a sum of \$150,000 for pain and suffering to the present, and we ask you to consider \$100,000 for pain and suffering for the future." While the jury gave favorable consideration to those figures, counsel's remarks did not rise to the level of expressed personal opinion that the Second Circuit criticized in *Mileski*, *supra*, at 1172-1173, and thus did not necessitate a curative instruction. Cf. *Mileski* at 1174. Nor did defendant object to this use of specific figures, or ask for a special instruction. In these circumstances, the adoption by the jury of figures suggested by counsel in summation furnishes no basis for a new trial or remittitur.

3 Carver's out-of-court declaration, offered to prove the truth of the matter asserted, would appear to be inadmissible hearsay, Rules 801(c), 802, F.R.Evid., but plaintiff raised no objection.

"Q Did you know Mr. Akermanis before he joined the vessel?" "A I attended school with him in Baltimore, Maryland, electrical school at the union school."

"Q When was that about?" "A I have no idea now. It was some time in the past."

Page 14:

"Q Did he ever sail on any of your ships?" "A No."

In the light of that testimony, plaintiff's counsel argued to the jury that Moulton's account of what Carver told him was a fabrication, Carver having testified that plaintiff had not sailed "on any of [his] ships."

Defendant attacks this argument as unfair because, in fact, plaintiff had sailed on the LOS ANGELES with Chief Engineer Carver during the period August through December, 1976. That is established by individual overtime sheets which defendant produced, *for the first time*, in support of the present motion. Long before trial, plaintiff had requested from defendant all of his work records, documents which rested within defendant's possession and control. Defendant forwarded a number of employment and overtime records to plaintiff's counsel; however, the overtime records for the period August-December, 1976 evidencing plaintiff's presence on board the LOS ANGELES, were not included. Defendant's counsel, in his affidavit in support of the present motion, says:

"A search of our file indicates that we were not in possession of plaintiff's records for that period, which were either misplaced or inadvertently not forwarded to us by defendant. Our firm then appears to have inadvertently forwarded the incomplete records to Mr. Thaler as part of our production of documents." Stearns affidavit at ¶ 32, p. 29.

It is apparent, therefore, that defendant failed to comply with a legitimate demand for production of highly pertinent documents. Defendant now seeks to parlay its own failure into

a ground for obtaining a new trial. One can almost admire the nerve of the effort, but it is devoid of merit. Defendant argues:

"There are two questions presented: (1) did the attorney for plaintiff know of the fact that, indeed, plaintiff and Carver had sailed in August to December 1976 as respectively Chief Engineer and Third Assistant Day Engineer aboard S/S LOS ANGELES and; (2), if the attorney should claim that he was not aware of this fact, what would excuse his failure to inquire of plaintiff before making such a central allegation of perjury in an effort to tip the balance in his favor in argument before the jury."

Stearns affidavit at ¶ 30, pp. 28-29.

Counsel's peroration appears in the last paragraph of his affidavit:

". . . the new trial issue of misconduct as a result of the imputation of perjury might be seen as turning upon single factor: the attorney's failure to ask plaintiff during direct examination whether or not he had sailed with Carver in 1976. A truthful answer to this question would have deprived plaintiff of any basis for the assertions of perjury in summation. A false answer would have, at least, alerted the defendant to the existence of some relevance to the question, and might have resulted in conclusive refutation, with the same effect. Instead, the attorney for plaintiff was content with what was at best, ambiguity and withheld the argument until summation, and this was deliberate." Stearns affidavit, ¶ 43, p. 40.

Plaintiff's counsel avers, in an answering affidavit, that "plaintiff had no recollection of serving with [Carver] one way or the other." Thaler affidavit at ¶ 115, p. 55. I accept that representation as plausible in the circumstances. Precisely for that reason, plaintiff's counsel explored the subject during Carver's deposition, with the answer quoted above. Plaintiff's counsel further explored the question by demanding the plaintiff's work records, with the results also described above. In

these circumstances, plaintiff's counsel can hardly be criticized for asking the jury to draw the inference that Chief Officer Moulton was embellishing his conversation with Carver. These events do not reveal an improper failure on the part of plaintiff's counsel to inquire; they reveal an improper failure on the part of defendant to respond to discovery. I accept the inadvertence of that failure, but defendant is hardly in a position to turn it to its advantage. It is permissible for counsel, in summation, to argue that the opposing party's witnesses were "less than candid and impartial" if, in the circumstances, the argument is "not without support in the record." *Juaire v. Nardin*, 395 F.2d 373, 377 (2d Cir. 1968). That is the situation in the case at bar.

The second issue requiring discussion relates to what counsel for both parties said in their summations about the presence, or absence, of spray upon the deck at the time of the alleged accident. Plaintiff called an expert witness, Captain Adams, to testify that, as the result of the wind and wave conditions and speed of the vessel, spray would have been present on the deck in the area where plaintiff was working. Plaintiff, in a supplement to the pre-trial order, had identified Adams as an expert witness it might call. At the conclusion of Adams' testimony, counsel for defendant advised the Court that he expected to call an expert witness "on the sole question of the possibility or likelihood of the existence of spray on the deck." Counsel stated further that he expected his expert to say that "the vessel was making a wake at the time, cutting through the water, and that there is no possibility whatsoever of such spray" from the waves existing at the time reaching the work area.

Plaintiff objected to the proffered expert testimony, on the grounds that defendant had failed to give notice of its intention to call such an expert, either in response to plaintiff's specific interrogatories on the point, or, as required, in the pre-trial order or a supplement thereto. The Court sustained plaintiff's objections, finding entirely unpersuasive (for reasons appearing in the trial transcript and not here repeated) the argument of defendant's counsel that he had been taken by surprise by Adams' testimony about spray on deck.

In the light of the Court's ruling that defendant was precluded from calling a "spray" expert, defendant's counsel raised the question of whether plaintiff's counsel would be permitted, in summation, to comment upon defendant's failure to call an expert witness to rebut the claim of spray on deck. The Court responded:

"I think that if Mr. Thaler undertook to say that in summation, I would be bound to advise the jury of the dialogue that we have just had, the application made on behalf of the defendant, and my ruling in respect to it."

Against that background, defendant's counsel, in giving the first summing up to the jury, argued as follows with respect to the testimony of plaintiff's expert, Captain Adams:

"He also indicated the spray, if any, coming aboard the ship would be coming at a point where the seas met the ship's bow. He then later said that any place alongside the starboard side some spray might be thrown up as a result of waves or the sea lapping against the ship's side and might somehow come on the deck.

"He forgot to mention the fact that when a ship goes through the water it makes a wake. The wake is the effect of the ship pushing the water out of the way, and as the water is imparted it moved away from the ship's side, not towards it.

"This might lead you to believe, and I suggest it's correct that in fact if any spray was coming aboard this ship as a result of encountering waves as high as 5 or 6 feet it would have been in the immediate vicinity of the starboard bow, a distance of some 400 feet or more, most likely 500 feet from where Mr. Akermanis was working.

"And in addition, you remember the testimony of Captain Adams to the effect that ship was, in breadth, that is from side to side, some point port to starboard, some 78 feet wide.

"That is correct, according to my calculations based on Lloyd's Registry, it was perhaps 10 feet. Another witness said 7 or 8 feet inboard from the starboard rail which means that he was a distance of no less than 68 feet on the longer or leeward side away from the rudder at the time of the occurrence.

"With all these factors considered and the additional fact that he was standing above the deck a distance of three or four feet, he was given the picture of the sea provided by the scale photographs. It's possible [sic] for the spray to have been on the pedestal and the place where plaintiff says it was." (Tr. 6-8) (emphasis added) (The word "possible" as appearing in the transcript should obviously be "impossible.").

This argument led plaintiff's counsel, in his summation, to say the following:

"Now, with regard to the spray, you recall the testimony that the water itself with these forces will have a spray on the water, a slight spray. Then the motion of the ship through the water, the spray is going to come up over and that was the undisputed testimony, notwithstanding what you have heard in argument here. There has been no testimony which disputes or contests that fact." (Tr. 51).

The following thereupon occurred:

"MR. STEARNS: In view of the Court's ruling on this point, this is an absolutely improper argument to make."

"THE COURT: I will say to the jury at this time that as a result of the ruling on a point of the law, which you are not aware of and which need not concern you, at the time the defendant decided to put on an expert witness to give evidence on the point that spray could not have come on the deck, as a result of a ruling of law which need not concern you, I declined to let that testimony in. I think you should know that in view of what counsel has just presented to you in argument." (Tr. 51).

Following summations, and in the absence of the jury, the Court expressed concern that the remarks of plaintiff's counsel transgressed the spirit, if not the precise wording, of the Court's ruling when defendant was precluded from calling a "spray" expert. Upon further consideration, however, I accept plaintiff's argument that the challenged statement of his counsel constituted fair comment upon what defendant's counsel had argued in his summation. Having failed to abide by the discovery rules and the requirements of the pre-trial order, defendant was precluded from calling an expert witness to describe how the vessel's wake would prevent spray from the waves affecting the work area. Defendant's counsel, in summation, sought to remedy the lack by supplying the testimony himself. In those circumstances, plaintiff's counsel was entitled, in fairness, to argue to the jury that the presence of spray was established by "the undisputed testimony, notwithstanding what you have heard in argument here," and that there was "no testimony which disputes or contests that fact."

It is, of course, well settled that "[i]mproper or intemperate argument by counsel in summation may necessitate a new trial where it tends to arouse undue passion or prejudice on the part of the jury, thereby depriving the opposite party of a fair trial." *Mileski, supra*, at 1171, and cases there cited. The courts should not hesitate to grant relief where counsel indulges in "outrageous argument," *San Antonio v. Timko*, 368 F.2d 983 (2d Cir. 1966), or when counsel "repeatedly went beyond the bounds of propriety," *Koufakis v. Carvel*, 425 F.2d 892, 901 (2d Cir. 1970). The Supreme Court has mandated a new trial where the record reveals "a bitter and passionate attack on petitioner's conduct of the case, under circumstances tending to stir the resentment and arouse the prejudice of the jury," *New York Central R.R. Co. v. Johnson*, 279 U.S. 310, 318, 49 S.Ct. 300, 303, 73 L.Ed. 706 (1929). But no such improprieties were committed in the case at bar. On the contrary, the comments which defendant particularly criticizes were justified by the circumstances. Complaints of prejudicial and unfair arguments to the jury are not sufficient to obtain a new trial where the behavior of counsel is not outrageous, and the jury's

verdict is justified, as in the case at bar, by the evidence in the record. *Fortunato v. Ford Motor Co.*, 464 F.2d 962, 971 (2d Cir. 1972).

V.

The final question raised by the parties is the rate of interest to be awarded on the judgment from the date of judgment⁴ until the date of satisfaction of the judgment. Plaintiff contends that New York law, which imposes an interest rate of 9% per annum,⁵ governs the issue. Plaintiff derives support for his position from 28 U.S.C. § 1961, which provides:

"Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the

4 In the case at bar, the judgment, which was signed on July 20, 1981, states that interest was to commence on July 15, 1981, five days prior to entry of judgment. This provision does not reflect the Court's determination that prejudgment interest is appropriate in this case, a decision defendant contends is precluded in a Jones Act case. Rather, it reflects an agreement between the parties to the effect that defendant would pay interest on the judgment from July 15, the original settlement date of the judgment, in exchange for an extension of time until July 20 within which to submit its own proposed judgment. Thus, defendant's cross-motion for an order amending the date interest was to commence is denied as moot.

5 N.Y.C.P.L.R. § 5004, as amended effective June 25, 1981. Plaintiff suggests that, if the Court should hold that New York law governs the question of the rate of interest, the Court is not bound by § 5004, but instead may look to the higher interest rates set in N.Y.G.O.L. 5-501. The purpose of § 5004, however, "is to set a fixed interest rate on judgments, independent of the usury provisions of General Obligations Law § 5-501, except as otherwise provided by statute." Law Revision Comm'n Note to L.1972, c. 358, § 1. The New York courts, to whom the Court must look should it find New York law applicable, have applied § 5004 to the exclusion of G.O.L. § 5-501. See Siegal, Supplementary Practice Commentaries to N.Y.C.P.L.R. § 5004 (McKinney's Supp. Pamphlet 1964-80). Accordingly, this Court is not free to award the higher rates of G.O.L. § 5-501, but is instead limited by the 9% rate set forth in CPLR § 5004.

courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at the rate allowed by State law."

The Court's original judgment provided for 6% interest. Plaintiff moves to amend to 9%.

Although the case at bar is a "civil case" and thus apparently falls within the express terms of § 1961, defendant contends that, since the cause of action arises under the Jones Act, a federal statute, the question of the rate of post-judgment interest is governed solely by federal law. Accordingly, defendant would defer to the discretion of the trial judge, discretion defendant feels was properly exercised when the Court signed a judgment providing for interest at the rate of 6% per annum.

The language of § 1961 is mandatory; it directs that interest "shall be" calculated at the rate allowed by state law. Its terms do not permit of the exercise of judicial discretion in its application. *Cf. Briggs v. Pennsylvania R. Co.*, 334 U.S. 304, 312, 68 S.Ct. 1039, 1043, 92 L.Ed. 1403 (1948) (Rutledge, J., dissenting) (construing predecessor statute to § 1961). Nor does § 1961 differentiate between cases arising under this Court's diversity jurisdiction and those arising under its federal question jurisdiction; the statute simply applies to all "civil cases." As the Second Circuit noted in *Kotsopoulos v. Asturia Shipping Co.*, S.A., 467 F.2d 91, 95 (2d Cir. 1972),

"the universal application of Section 1961 to all types of claims makes for logical uniformity. Once a claim is reduced to judgment, the original claim is extinguished and merged into the judgment; and a new claim, called a judgment debt, arises. See Restatement of Judgments § 47 (1942). A single rule should govern interest on any such debt, the nature of the original claim having become irrelevant under the doctrine of merger."

Although *Kotsopoulos* was brought under the general maritime law, its principles have since been applied to Jones Act cases. *Reinertsen v. George W. Rogers Construction Corp.*, 403 F.Supp. 1263 (S.D.N.Y. 1975); see *Barrios v. Louisiana Constr. Materials Co.*, 465 F.2d 1157, 1168 (5th Cir. 1972).

Defendant cites *Briggs v. Pennsylvania R. Co.*, 164 F.2d 21 (2d Cir. 1947), *aff'd*, 334 U.S. 304, 68 S.Ct. 1039, 92 L.Ed. 1403 (1948), as support for the proposition that federal rather than state law governs the rate of interest in cases arising under a federal statute. In *Briggs*, which involved a cause of action under the F.E.L.A., there were two judgments entered—one after the original trial and the other after remand by the Court of Appeals. The question faced by the Second Circuit was from *which* of the judgments interest should run, an issue resolved in favor of the latter date by applying federal law. *Briggs* is relevant to the case at bar, however, not because the Second Circuit relied on federal law to interpret the term "the date of the judgment," as that phrase was used in 28 U.S.C. § 811, the predecessor statute to § 1961, but because the Second Circuit, and the Supreme Court on appeal, in reaching that issue necessarily assumed the applicability of 28 U.S.C. § 811 to F.E.L.A., and thus Jones Act, cases. Interpretation of § 1961 is not an issue in this case; the language in § 1961 concerning the rate of interest is clear and unambiguous. The issue is the statute's applicability to a Jones Act case, and on that *Briggs* is unequivocal.

From the foregoing, it is clear that § 1961, and through it New York state law, controls the question of the appropriate rate of interest, a rate set by N.Y.C.P.L.R. § 5004 at 9% per annum. Moreover, it should be noted that, even if the question of the rate of interest were left to the Court's discretion, considerations of public policy would warrant raising the rate of interest to 9%. In today's economy, it is not unusual for one to earn interest on one's money at a double-digit rate. Accordingly, a defendant motivated only by self-interest would be economically well advised to defer as long as possible the payment of a judgment accruing interest at a rate of 6%. Such a disincentive to ending litigation instigated for the purpose of making a plaintiff whole should not be encouraged.⁶

6 One additional point on the form of the judgment should be noted, although not directly raised on these motions. Defendant took the position in the charge conference, after both sides had rested, that it was entitled to an instruction that the claim for lost earnings should be calculated on the basis

VI.

For the reasons stated under Point II *supra*, defendant is entitled to a new trial on the question of contributory negligence, unless plaintiff agrees to an appropriate remittitur. The remaining question is the dimension of the new trial, if plaintiff does not agree to the remittitur.

Rule 59(a) provides that a new trial "may be granted on all or part of the issues . . ." Thus the rule provides for partial new trials in appropriate circumstances. "Perhaps the most

of net wages after taxes. Alternatively, defendant contended that the Court should judicially notice the tax rates and perform the deduction itself. After the requested instruction was denied, defendant submitted a counter-judgment in an amount reduced to reflect an accountant's calculation of the tax impact. The Court declined to sign that judgment.

Defendant relied upon *Norfolk and Western Railway v. Liepelt*, 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980), which the Second Circuit recognized in *Doca, supra*, at 35 may cast doubt upon that court's earlier rule that in an FELA case no deduction would be made for taxes. See *McWeeney v. New York, New Haven & Hartford R. R. Co.*, 282 F.2d 34 (2d Cir.) (en banc), cert. denied, 364 U.S. 870, 81 S.Ct. 115, 5 L.Ed.2d 93 (1960). In *Liepelt* plaintiff's expert testified that decedent, had he lived, would have earned wages totalling \$302,000. Defendant offered to prove, through an expert actuary, that income taxes would have reduced the pecuniary loss to a net figure of \$138,327. Defendant also requested an instruction to the jury that the award of damages would not be subject to income taxation. The jury awarded plaintiff \$775,000. The Court held that the proffered evidence should have been received, and the requested instruction given.

In the case at bar, the parties were directed to submit their requests to charge prior to trial. Defendant asked that the jury be instructed that any award to plaintiff would not constitute taxable income. That charge was given. Defendant did not ask for an instruction that the jury should *reduce* its award to reflect net, after-tax figures until the proof was closed; and, unlike the defendant in *Liepelt*, offered no expert testimony on the quantum of the tax impact. In these circumstances, defendant was not entitled to the requested charge. There was no evidence before the lay jury upon which to base a calculation, and the belated timing of the request deprived plaintiff of the opportunity to meet the issue with research on the law or with evidence of his own. Nor was the Court prepared to reduce the judgment itself on the basis of defendant's post-trial calculation. The factual issues, had they been timely raised, were for the jury, and plaintiff cannot be deprived of his right to jury trial upon them.

common example is the grant of a new trial limited to damages when liability has been properly determined, but there also may be a new trial on liability with the prior determination of damages allowed to stand." Wright and Miller, *Federal Practice and Procedure*, § 2814, pp. 93-95 (1973). The granting of a partial new trial is subject to a *caveat* that "it may not be properly resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice . . ." *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 500-01, 51 S.Ct. 513, 515, 75 L.Ed. 1188 (1931).

Contributory negligence is a liability issue. As the Fifth Circuit observed in *Landry v. Two R. Drilling Co.*, 511 F.2d 138, 143 n.4 (5th Cir. 1975), "[a]lthough contributory negligence is often referred to in these cases as a factor 'in mitigation of damages', e. g., *Pope & Talbot v. Hawn*, 346 U.S. 406, 409, 74 S.Ct. 202, 204, 98 L.Ed. 143 (1953), it is conceptually a factor in assessing the relative *liabilities* of the parties." (emphasis in original). Thus, where the trial court fails to properly instruct the jury on contributory negligence, but the jury's calculation of damages is invulnerable to attack, the new trial will be limited to liability issues, with the verdict on damages to stand in the event defendant is again found liable. *Dazenko v. James Hunter Machine Co.*, 393 F.2d 287, 291 (7th Cir. 1968). Cf. *Landry, supra*, which presented the converse situation:

"Because contributory negligence is a factor for determining the comparative liability between the parties, whether under the Jones Act or general maritime law, *Pope & Talbot v. Hawn, supra*, and because we see no reason to disturb the jury's finding on liability, *II supra*, any award in a new trial solely on the issue of damages must be reduced by 20% by the Court." 511 F.2d 143 at n.4.

In the case at bar, there is no basis to disturb the jury's award of damages. Consequently, if plaintiff does not accept a remittitur based upon a 25% contributory negligence factor, defendant will be entitled to a new trial on liability only, at

which defendant may relitigate the issues of its own negligence and that of the plaintiff. *Dazenko, supra.*

For the foregoing reasons, it is ORDERED as follows:

1. Plaintiff's motion to amend the judgment is granted. Plaintiff is directed to file and serve, within fourteen (14) days of the date of this Order, an amended judgment providing for interest at the rate of 9% per annum from July 15, 1981 until paid.
2. Defendant's motion for judgment in its favor n. o. v. is denied.
3. Defendant's motion for a new trial on damages issues is denied.
4. Defendant's motion for a new trial on liability issues is granted, and a new trial ordered, unless within twenty (20) days of the date of entry of the judgment called for by paragraph 1 of this Order, plaintiff files with the Clerk of the Court a remittitur of all damages in excess of that amount resulting from application of a 25% reduction for contributory negligence.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

77 Civ. 6131-CSH

CARL O. AKERMANIS,

Plaintiff,

—against—

SEA-LAND SERVICE, INC.,

Defendant.

ORDER

Defendant's motion for reargument of this Court's opinion and order dated October 14, 1981, presenting no matters or controlling decisions which the Court has overlooked, is hereby denied. Counsel for plaintiff need not respond to the motion and is directed to keep the Court advised of his intentions in accordance with the October 14 order.

It is So Ordered.

Dated: New York, New York
November 2, 1981

S/ CHARLES S. HAIGHT, JR.
Charles S. Haight, Jr.
U.S.D.J.

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

77 Civ. 6131-CSH

CARL O. AKERMANIS,

Plaintiff,

—against—

SEA-LAND SERVICES, INC.,

Defendant.

JUDGMENT ON A REDUCED VERDICT

The trial of the above entitled case having been tried before the Honorable Charles S. Haight, Jr., District Judge before a jury on June 15, 1981, and at the conclusion of the trial on June 26, 1981 the jury having returned a verdict in favor of the plaintiff, CARL O. AKERMANIS, in the sum of \$528,000.000, and against the defendant, SEA-LAND SERVICES, INC., and the jury having found the plaintiff, CARL O. AKERMANIS, four percent contributory negligent, and the Court having ordered a new trial on liability in said action unless said plaintiff filed with the Clerk of the Court a Consent within twenty days of the date of entry of the judgment as amended which provides for nine percent interest on the jury verdict and plaintiff having filed with the Clerk of the Court a remittitur of all damages in excess of that amount resulting from the application of a twenty-five percent reduction for contributory negligence, and said remittitur having been duly executed and filed with the Clerk of the Court, it is

ORDERED, ADJUDGED and DECREED, that the plaintiff, CARL O. AKERMANIS, have judgment as against the defendant, SEA-LAND SERVICES, INC., in the sum of

\$232,500.00 for the loss of earnings and pain and suffering to the present, and the sum of \$171,000.00 for loss of earnings and pain and suffering in the future less a two percent discount to present value, leaving a sum total of \$149,933.36 for future loss of earnings and pain and suffering, and that plaintiff have judgment in the sum of \$382,433.36, together with costs and interest at the rate of nine percent per annum commencing July 15, 1981 to such date on which the judgment is paid.

Dated: New York, New York
November 5, 1981

s/ CHARLES S. HAIGHT, JR.

Honorable Charles S. Haight, Jr.
United States District Judge

Judgment Entered 11/17/81

s/ Raymond F. Burghardt
Clerk

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

77 Civ. 6131-CSH

CARL O. AKERMANIS,

Plaintiff,

—against—

SEA-LAND SERVICE, INC.,

Defendant.

APPEARANCES:

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Of Counsel.

MEMORANDUM OPINION AND ORDER

HAIGHT, *District Judge:*

Following trial of plaintiff's claim under the Jones Act, 46 U.S.C. § 688 (1976), for an injury suffered on board defendant's vessel S/S LOS ANGELES, the jury found that defendant's negligence proximately caused plaintiff's accident; that plaintiff's damages totalled \$528,000; that plaintiff was also

negligent; and that the share of responsibility attributable to his negligence was four percent. This Court entered judgment for plaintiff in the amount of \$489,514.61, representing the four percent reduction for contributory negligence and a two percent discount on future damages.

Thereafter defendant moved for judgment n.o.v. under Rule 50, F.R.Civ.P., or for a new trial under Rule 59, or a remittitur. This Court denied the motion for judgment n.o.v., but ordered a new trial on liability issues only unless plaintiff accepted a remittitur of damages, based on an increase of the contributory negligence factor from four to 25 percent. 521 F.Supp. 44 (S.D.N.Y. 1981).

Cross appeals followed. Defendant contended it was entitled to an unconditional order for a new trial. Defendant also challenged various evidentiary rulings and the Court's charge to the jury. Plaintiff sought an increased judgment based on the jury's initial, four percent determination of the share of responsibility attributable to his negligence.

The Court of Appeals, in a unanimous opinion authored by Judge Newman, after first concluding that it had appellate jurisdiction over plaintiff's cross appeal, went on to hold that, unlike a decrease of a determination of damages, the jury's apportionment of responsibility was "not subject to adjustment by the device of a remittitur." 688 F.2d 898, 903 (2d Cir. 1982). To that extent, both parties succeeded on their appeals. Defendant's other points on appeal were rejected. This Court's judgment was accordingly reversed, and the case remanded "for further consideration consistent with this opinion," *Id.* at 907.

The "further consideration" enjoined upon this Court by the Court of Appeals requires me to decide whether, "in the context of the entire trial," the jury's assessment of plaintiff's fault "at only four percent is against the weight of the evidence," *id.* at 905. That task necessitates a review of the pertinent evidence, with a proper deference to those portions of Judge Newman's opinion which analyze it. I must then choose between the three specific options which emerge from the Court of Appeals' decision: (1) entering judgment for

plaintiff on the jury's original computation; (2) ordering a new trial limited to the question of contributory negligence, both its existence and its percentage; or (3) ordering a new trial on all liability issues.

I directed counsel for the parties to file further briefs on the question of which option should be adopted. These are now at hand, and this decision resolves the issue.

I.

Before addressing the specific question presented, defendant argues at length that Judge Newman's opinion for the Court of Appeals is full of improprieties, rising to the level of an unconstitutional abrogation of appellate judicial power. It is idle to address these arguments to me. Presumably defendant urged them in its unsuccessful petition to the Court of Appeals for rehearing *en banc*; however, as far as this Court is concerned, the analysis, rationale, and decision of the Court of Appeals combine to form the present law of the case which I must and will follow. Accordingly I will evaluate the trial evidence in the manner directed by the Court of Appeals, and chose among the three options delineated in its opinion.

In order to place this exercise in proper perspective, it is useful to quote at some length from Judge Newman's opinion. At 688 F.2d 904, Judge Newman paraphrased this Court's reasoning in granting defendant's motion for a new trial as having been:

"... based on a conclusion that Akermanis had the authority to schedule his own work and that he exercised poor judgment by agreeing to work on the Los Angeles' deck on June 4, 1977, when he might have deferred the task to another day." (footnote omitted).

In point of fact, my reasoning focused more upon plaintiff's possible exercise of poor judgment in not performing this work *prior* to June 4, 1977. The LOS ANGELES was on a voyage from Piraeus to Rotterdam, with a stop en route at Algeciras; my opinion stated: "Plaintiff could have reasonably foreseen that it would be safer to do burning and finishing work on an

exposed deck in the Mediterranean rather than the North Atlantic." 521 F.Supp. at 51. Thus the intimation was that plaintiff perhaps should have accomplished this work at an earlier time, while the vessel was still in the Mediterranean, before calling at Algeciras and then proceeding into the North Atlantic.

In any event, Judge Newman's opinion resumes as follows:

"If that was the jury's conclusion, then, based on the evidence presented at trial, Judge Haight was acting within his broad discretion in ruling that a finding of only four percent contributory negligence was against the weight of the evidence and that a new trial should be granted. It is possible, however, that the jury's finding of contributory negligence was not based on a conclusion that Akermanis chose to work on the pedestal that day. The jury might have concluded that Akermanis was directed to work on the pedestal at the time of the accident, but that he was negligent in the manner in which he performed his work. During cross-examination, Akermanis admitted that his own preoccupation with burning the bracket might have contributed to the accident. During his summation, counsel for the defendant reviewed the events surrounding Akermanis' accident and suggested to the jury that the accident 'was something due to, perhaps, a momentary lapse of carefulness on his part.' If the jury was focusing on the plaintiff's manner of working at the time of the accident, it is arguable that they considered Akermanis' work performance to be negligent but that such negligence represented only a slight percentage of the cause of the accident. In his memorandum opinion, Judge Haight gave no explicit consideration to this possible explanation for the jury's contributory negligence factor of four percent.

"Ordinarily, we might not be so concerned that a trial judge explicitly consider every possible justification for a jury's verdict before concluding that a verdict is against the weight of the evidence and ordering a new trial. But this case arises under the Jones Act, and jury findings

under that Act, which incorporates standards of the FELA, are particularly resistant to being overturned. See *Morgan v. Consolidated Rail Corp.*, 509 F.Supp. 281, 285 (S.D.N.Y. 1980). Because we recognize that a trial judge, with a 'feel' of the case, *Neely v. Martin K. Eby Construction Co.*, *supra*, 386 U.S. at 325, 87 S.Ct. at 1078, is normally in the best position to determine whether a verdict is against the weight of the evidence, we prefer to have Judge Haight consider whether the 'work performance' theory of contributory negligence finds enough support in the evidence, assessed in the context of the entire trial, to justify the four percent factor. If he concludes it does not, then his order for a new trial will stand. Even if he concludes that the 'work performance' theory alone *would* support a four percent factor, then Judge Haight will have the option of either entering judgment for the plaintiff on the jury's damage computation, reduced by only four percent, or ordering a new trial. This latter option remains a possibility because of an intimation in Judge Haight's opinion that he thinks the jury would have committed serious error if they had not attributed at least part of the responsibility for the accident to Akermanis for continuing to work on deck despite the inclement weather and unsafe conditions. In other words, Judge Haight may find that the 'work-performance' theory justified a four percent factor, but that Akermanis' negligence in continuing to work is so strongly supported by the evidence that a verdict assessing his share of fault at only four percent is against the weight of the evidence, whether or not the jury based its finding of contributory negligence on the 'continuing-to-work' theory. In short, the District Judge, upon remand has discretion whether or not to order a new trial." 688 F.2d 904-06 (footnotes omitted).

Against this background, I first consider whether or not, in light of the entire evidence and the Court of Appeals' analysis of the theories of contributory negligence revealed by the

evidence, the jury's assessment of a four percent factor is against the weight of the evidence. If the answer to that question is "no," judgment will again be entered on the jury's original computation. If the answer is "yes," the question of proper structuring of the retrial arises.

II.

Plaintiff is entitled to the benefit of the jury's verdict unless, in Judge Newman's words, factors militating in favor of a greater attribution of fault on his part are "so strongly supported by the evidence that a verdict assessing his share of fault at only four percent is against the weight of the evidence," 688 F.2d at 905. This reflects the settled rule that the trial judge, operating under Rule 59, should "abstain from interfering with the verdict unless it is quite clear that the jury had reached a seriously erroneous result." *Behevino v. M.S. Saydjari*, 574 F.2d 676, 684 (2d Cir. 1978), quoting 6A Moore's Federal Practice, ¶ 59.08[5], at 59-160-161 (1973). And Judge Newman also reminds us that jury findings under the Jones Act, "which incorporates standards of the FELA, are particularly resistant to being overturned." *Ibid.*

In reviewing the evidence on remand, I have considered both theories of contributory negligence identified by the Court of Appeals. These are the "work-performance" theory, and the "continuing-to-work" theory. Under the Court of Appeals' analysis, quoted *supra*, the "work performance" theory focuses upon plaintiff's allegedly negligent acts while working on deck. The "continuing to work" theory focuses on his alleged negligence in working on deck at all under the prevailing conditions.

In its most recent submissions to this Court, defendant argues that "the 'work performance' theory, as a comparative negligence issue, was raised for the first time by the Honorable Jon Newman at oral argument before the Court of Appeals." Counsel's letter of December 17, 1982 at 11. And, defendant continues, Judge Newman's discussion of the "work performance" theory is just plain wrong: ". . . the Court of Appeals' speculation that the jury might have found plaintiff contribu-

torily negligent *only* because of "work performance" is demonstrably unsound . . ." *Id.* at 12 (emphasis in original).

Again, it is idle to argue to me that the Court of Appeals engaged in "unsound speculation." Judge Newman conducted his own review of the evidence and summations of counsel. Judge Newman focused upon Akermanis' testimony on cross examination that "I didn't watch my foot," and defense counsel's argument to the jury that the accident "was something due to, perhaps, a momentary lapse of carefulness on his part." 688 F.2d at 905 n.4. A unanimous panel concluded that if the jury "was focusing on the plaintiff's manner of working at the time of the accident, it is arguable that they considered Akermanis' work performance to be negligent but that such negligence represented only a slight percentage of the cause of the accident." 688 F.2d at 905. That which the Court of Appeals has said is "arguable"—that is, a result permissible in law—let no district judge cast aside as unsound in law. The first task set before me is to determine "whether the 'work performance' theory of contributory negligence finds enough support in the evidence, assessed in the context of the entire trial, to justify the four percent factor." *Ibid.* I would not perform that task by accepting defendant's argument that the Court of Appeals should not have given it to me.

Applying the applicable standards of review to the "work performance" theory of contributory negligence, I conclude that a four percent factor is justified. The jury clearly accepted plaintiff's basic contentions that the work site was, in fact, unsafe; that the chief engineer and first engineer assigned Akermanis to perform the work; and the chief officer, responsible for safety on deck and aware of Akermanis' assignment, took no preventive steps. Plaintiff's counsel argued, and the jury could find, that the manner in which the burning and cutting job had to be performed left plaintiff little room for maneuver.¹ When I consider these factors within the context of

1 Plaintiff's counsel argued in summation:

"I'd like to talk about the injury and what he was doing and he was supporting, yes, he had to support the flame, he had to put his foot

defendant's previously noted argument in summation that the accident might have resulted from "a momentary lapse of carefulness on [plaintiff's] part," I cannot conclude that a four percent contributory negligence factor brings about a "seriously erroneous result."²

I come, therefore, to the next question posed by the Court of Appeals' analysis:

"In other words, Judge Haight may find that the 'work-performance' theory justifies a four percent factor, but that Akermanis' negligence in continuing to work is so strongly supported by the evidence that a verdict assessing his share of fault at only four percent is against the weight of the evidence, whether or not the jury based its finding

on that piece of iron, this piece of iron here, and the wind was causing the instability and he had to line it up, and his foot slipped here. What about doing that job?

"The chief engineer said that's the way that job is done. You want to put your foot up to get support, you do. You get your foot up to get support, you do. You get your foot on the pedestal. That's the only way it's done. The only difference is it's not done during the adverse weather conditions that existed at the time it was done and at the time the assignment should never have been given, and if you believe Chief Officer Moulton, that he saw Mr. Akermanis, he let him continue that work." 2061 A.

2 I appreciate defendant's insistence that counsel's quoted reference to plaintiff's "momentary lapse of carefulness" was uttered solely within the context of causation, and was not intended as a contributory negligent argument. That observation finds support in the fact that, summing up on contributory negligence, defendant's counsel referred only to the "continuing-to-work" theory: "If they [the ship's officers] were wrong in permitting this work, Mr. Akermanis was certainly wrong in doing it." 2030 A. But a fine-tuned awareness of the distinction between negligence and causation, acquired by lawyers during their education both in law school and practice, may not be shared by lay jurors. It is entirely plausible, as Judge Newman observed, that the jury considered the evidence and the arguments of counsel as bearing on the issue of relative degrees of fault for the accident befalling plaintiff. And as the Court of Appeals pointed out, "it is a function of the comparative negligence doctrine to permit the jury to reconcile conflicting versions of an episode." 688 F.2d at 904-05 n.3.

of contributory negligence on the 'continuing-to-work' theory." 688 F.2d at 905.

Based upon my "feel" of the case, to which the Court of Appeals itself extends a certain deference, *ibid*, I am bound to say that my original remittitur on the contributory negligence question was based upon the perception I then had that Akermanis could, and should, have performed this on-deck burning and cutting work, while the LOS ANGELES was still in the sheltered waters of the Mediterranean. At 521 F.Supp. 49-50 I quoted certain evidence on the point; this prefaced my observation, at 51, that: "Plaintiff could have reasonably foreseen that it would be safer to do burning and finishing work on an exposed deck in the Mediterranean rather than the North Atlantic."

In obedience to the Court of Appeals' mandate, I have again carefully reviewed the evidence. That review results in a significantly altered perception.

The LOS ANGELES departed the port of Piraeus at 2048 hours on May 28, 1977, a Saturday. Plaintiff's contemporaneous Individual Overtime Sheet (Pl. Ex. 14) reflects that, on that day, he spent eight hours "working on deck repairs—supper relief." On Sunday, May 29, plaintiff logged eight overtime hours which are described, under the column captioned "nature of work performed": "Renew rusted-out fitting on deck. Supper relief." Precisely the same functions are described for eight hours' overtime work on Monday, May 30. The vessel's log reflects that she arrived at the port of Algeciras, on the southern coast of Spain, at 0530 hours on June 1. Algeciras is in the area of Gibraltar; when a vessel arrives at that port, her passage through the Mediterranean has been completed, and the North Atlantic looms ahead. After discharging part of her cargo, the LOS ANGELES departed Algeciras for Rotterdam at 0758 hours on June 2.

The evidence thus reveals that, on May 29 and again on May 30, Akermanis devoted eight hours' overtime to performing the same sort of work upon which he was engaged at the time of his accident on June 4. This is explicable by the fact that

there were a series of "pedestals" on the deck, which required this burning off and replacement of fittings. It is also clear from the evidence that, in addition to working on this project, Akermanis had other duties in the engine room to perform. While plaintiff's overtime sheet contains no notation for May 31, it is apparent that on two of the three days at sea in the Mediterranean, Akermanis devoted significant periods of overtime to this ongoing on-deck project which the chief engineer had directed him to perform.

The clear, unambiguous, and contemporaneous notations in plaintiff's overtime sheets are more probative of his work performance and opportunities during the Mediterranean passage than is his trial testimony, which upon further reflection contains certain ambiguities. While I do not consider that the record supports plaintiff's most recent submission that the chief engineer did not permit work to be done upon the particular turnbuckles involved in the accident until the vessel had left Algeciras, the totality of the evidence is inconsistent with my own prior perception that Akermanis could, and should, have attended to this deck work while the vessel was still in the Mediterranean. The totality of the evidence clearly permits the inference that Akermanis attempted to do just that, but that there were too many turnbuckles to be attended to before the LOS ANGELES reached the North Atlantic. In those circumstances, the jury would have been entirely justified in rejecting defendant's argument that plaintiff should have accomplished the work upon which he was engaged on June 4 prior to the time the vessel reached Algeciras in the early morning hours of June 1.

It is, of course, still possible for defendant to argue that plaintiff should have refused to perform the work in question in the conditions that prevailed on June 4. But that is a significantly different, and from defendant's point of view less appealing, proposition. The chief engineer had made it plain that he wished this work completed before the vessel reached Rotterdam. On June 4, the LOS ANGELES was nearing Rotterdam; she arrived at that port on June 6. When on the morning of June 4 the first assistant engineer told Akermanis

that the chief engineer wanted him to resume burning and rewelding work on deck, Akermanis (who had been on deck sounding the tanks and was "pretty wet already because the sprays [sic] was coming over the side"), responded: "That's pretty rough job in weather like this." Akermanis complied, however, with his superiors' reitereted direction that the work be performed that morning.

For the reasons indicated, I eliminate from consideration the concept that Akermanis foolishly waited until the North Atlantic to perform work that he could have accomplished in the Mediterranean. An additional reason for doing so is that defendant, bearing the burden of proof on plaintiff's contributory negligence, offered no evidence concerning the hours which Akermanis had to devote to other duties. We are left, then, only with the circumstances confronting Akermanis and his superior officers on the morning of June 4; and in those narrowed and significantly different circumstances, I conclude that the jury was entitled, within the context of the "continuing-to-work" theory, to limit plaintiff's contributory negligence factor to four percent.

My own "feel" for the case is that it was upon this theory of contributory negligence that the jury held plaintiff entitled to recover less than his full damages. Whether or not that is true, upon a further review of the entire evidence, and in the light of the Court of Appeals' decision, I am not persuaded that a four percent contributory negligence factor is against the weight of the evidence, thereby constituting serious error. Stating the proposition somewhat differently, defendant has not carried its considerable burden of demonstrating that the jury findings in this Jones Act case should be overturned.

CONCLUSION

For the foregoing reasons, judgment will again be entered in an amount consistent with the findings of the jury.

Settle judgment on notice.

Dated: New York, New York
January 18, 1983

S/ CHARLES S. HAIGHT, JR.
Charles S. Haight, Jr.
U.S.D.J.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

83-7173

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 17th day of June, One Thousand Nine Hundred and Eighty-three.

Present:

HON. ELLSWORTH A. VAN GRAAFEILAND,
HON. LAWRENCE W. PIERCE,
HON. JOHN MINOR WISDOM,*

Circuit Judges.

CARL O. AKERMANIS,

Plaintiff-Appellee.

—v.—

SEAL-LAND SERVICE, INC. and R.J. REYNOLDS INDUSTRIAL
LEASING CORPORATION,

Defendants,

SEA-LAND SERVICE, INC.,

Defendant-Appellant.

ORDER

Defendant Sea-Land Service, Inc. appeals from a judgment of the United States District Court for the Southern District of New York (Haight, J.), entered February 8, 1983, awarding

* Senior Circuit Judge of the Fifth Circuit, sitting by designation.

plaintiff-appellee Carl Akermanis \$489,514.61 in his seaman's personal injury action brought under the Jones Act, 46 U.S.C. § 688. We affirm.

The trial judge did not abuse his discretion in refusing to order a new trial. *See Behevino v. Saydjari*, 574 F.2d 676, 683-84 (2d Cir. 1978). Inasmuch as the jury's finding that appellee was 4% negligent is not contrary to the weight of the evidence, the trial court did not err in entering judgment based upon the jury's verdict.

Appellant has cited no special circumstances in this case that, in the interest of justice, justify departure from the decision of the earlier panel in this matter. *See Rodman v. CIR*, 548 F.2d 1109, 1111 (2d Cir.), cert. denied, 434 U.S. 819-20 (1977). Accordingly, we decline to disturb this Court's earlier rulings.

Judgment affirmed.

/s/ HON. ELLSWORTH A. VAN GRAAFEILAND

Hon. Ellsworth A. Van Graafeiland

/s/ HON. LAWRENCE W. PIERCE

Hon. Lawrence W. Pierce

/s/ HON. JOHN MINOR WISDOM

Hon. John Minor Wisdom

APPENDIX H

Akermanis-direct

A Right, a.m.

Q Where on board ship did you have this conversation?

A Outside the chief engineer's room.

Q Who was there during this conversation?

A I went over there. I just have—I think I see a wiper or a couple of other guys waiting for their job, so the first assistant came up in the chief engineer's room, as usually he do every morning, and I asked, question them, "What are we going to do today?"

And he told them that chief engineer—

MR. STEARNS: Objection to the hearsay.

THE COURT: I think it would fall within any admissions' exception, Mr. Stearns. I'll permit it.

Q Continue.

A He told me that the chief engineer wanted me to work on that securing—that turnbuckle gear, burn it off and reweld it and new parts were to be made.

While I was sounding tanks, just a few minutes earlier, I was pretty wet already because the sprays was coming over the side, you know, on te [sic] ship, and I told the first assistant, I said, "That's pretty rough job in weather like this."

Because we didn't have no containers on

Akermanis-direct

A Okay, I told him that I—the weather is a little bit too rough, it's dangerous to go outside, and we was some kind of a—

MR. STEARNS: I move to strike, and ask that he answer the question.

THE COURT: The last part of the answer will be stricken. Go ahead.

Q What did he say, if anything?

A He said, "Well, if you can't do it," he said, "I'll do it myself."

Q What did you say?

A I told him, "Okay." I never refused to do anything, and I said, "Okay, I'd do it, because I listened what the first assistant chief tells me. "I'll go."

MR. STEARNS: Objection, move to strike, not responsive.

THE COURT: Yes, the jury will disregard the last part of the answer. The witness' answer was he replied to the first engineer, "Okay, I'll do it."

Q Is the first assistant your superior?

A Yes, the closest superior.

Q Then of course there is the chief?

A Then is the chief, right.

Q What did you do to prepare for the job

Akermanis-cross

I guess it was the Mediterranean.

Q That means that this project, the burning off and the replacement of these supports was given to you, you were told to do it sometime during at least the period when the vessel was in the Mediterranean; isn't that so?

A I was doing the work day by day. I maybe work one hour on that pedestal supports, those new gadgets, and then I be working someplace else, in the sewer lines or anything else.

Q Sure.

A It was nothing—for me, I didn't have no list, "Listen Carl, now I want you to make all these things next and you install on the deck."

In the first place, I didn't even know what those gadgets was for. They had one sample. I don't know who made that sample, and I followed that sample and I made just like that.

Q The point being, sir, that this project was in the nature of an ongoing thing, correct?

A Say again.

Q This project of cutting off and replacing these pedestal supports was an ongoing thing, correct?

A Yes.

Akermanis-cross

for anything. I just did the job good, no special time for it.

Q Would you say that that was something that you might have done in, say 15 or 20 minutes?

A I don't mention time at all. I just used whatever it take to flush off and have a good job.

Q The question is, can you, based on your recollection of doing that work, tell us what it was, approximately, in terms now of time that it took you to cut and prepare one of these fittings from the pedestal on the deck?

A You mean the top of the pedestal?

Q Yes. Cut it through, cut off the old piece and level it out or smooth it out, whatever you said, and get it ready for the welding; how long would it take?

A I estimate it was—it was pretty clean that top, half is rusted off, just the bottom part left. I would say make ready that platform, maybe 15 minutes, that is, 15, 20 minutes.

Q On the morning of June 4, 1977, you reported out on deck to begin work; is that correct?

A You had to mention—I mean, repeat that question.

Q On the morning of June 4, 1977, did you report

Akermanis-cross

still wiper.

When I took the job, I'm still third assistant, a repairman, so I respect my engineers over me as my leaders. I don't pick up no job. They pick up the job and I do it.

Q Just as you respect them—

A I don't expect—

Q —they respect you and respect your experience and your license and your years at sea?

A After they give me the job, not before. I no going to tell chief engineer or first assistant what I have to do.

I have been with chief on that, they jump on me. They say, "Who is the chief here, you or me?"

I sail with a man under me who had older license and they was telling me what to do and give ideas. If he had a good idea, it's okay. But if not, I say, "I'm the chief there, not that man next to me—tell what to do," and I respect that.

Q Part of the mutual respect and, in fact, the respect that you were shown by the first assistant engineer and chief engineer on this vessel, in fact, no one needed to tell you precisely when or precisely how to do anything as simple as this job of replacing the pedestal supports, correct?

A Yes, after they give me the job, I do it.

Q Sure. If you want to go out and burn now, go ahead. If you want to go down to the machine shop and make up a piece, go ahead.

* * * *

"Miller

"Q Now, Doctor, if you had seen Mr. Akermanis, for example, for a pre-employment physical prior to getting aboard a vessel, a theoretical vessel, in June 1977, and you had taken x-rays on June 4 in the morning 1977, prior to any alleged injury, and had observed the degree of spondylosis that you believe existed at that time; if Mr. Akermanis was required as part of his job to go out and work on deck as a working engineer burning and welding, sometimes at some heights over the deck, would you have believed that he was disabled from doing that sort of work?

"A Well, again, I think that he probably was not disabled. In other words, he probably could do these tasks. However, I do not think they would be advisable, and therefore I think he would be disqualified from them. But that does not mean he could not do them.

"Q But when you say, 'disqualified,' you are—

"A I recommend that he not engage in these activities.

"Q Now, with respect to the situation later on in, I think, particularly September, and at least

not part of the license requirement, which is further reason, if any were needed, why it was perfectly clear that this work was not done under compulsion but was simply voluntary overtime, work he could refuse to do, work which the normal respect of one engineer for another permitted him to do obviously within some limits at his discretion.

Did he have to do the burning that morning? Could he have waited until the afternoon? Could he have waited until the next day? The answer clearly is yes.

And why did he not wait? Because in fact the conditions on deck, the weather conditions on that day, the barometric pressure, as I remember it, being well over 30, with the winds Beaufort force 5 increasing from 3 to 4, anything from 21, 22 miles an hour decreasing to probably something in the range of 10, were not unreasonable, unsafe.

In an effort to show that the ship would have known that Mr. Akermanis was working, there was testimony that the people on the bridge would have been able to see him, that is, the people on the bridge at the afterhouse looking forward some 51 feet would have seen him out there.

Mr. Akermanis has been undergoing the treatment regarding cervical problems. I'm not going to go over that, and he will continue to have them for the rest of his life, and his life expectancy, which his Honor will instruct you on is 14.14 years and—

THE COURT: Not precisely what I'm going to tell the jury. I will give the jury the appropriate instruction tomorrow.

MR. THALER: Right.

And based upon his Honor's instructions you will have to make a determination how long Mr. Akermanis will live, and Dr. Golub, you'll recall, testified as his vascular problems and gave his opinion in reading the medical record, giving him an examination, that these vascular problems and the heart problems were not disabling, not permanently disabling in that the man was definitely able to function.

I remember he said "Look at the man" and public health again made the same determination. We ask you to consider a sum of \$150,000 for pain and suffering to the present, and we ask you to consider \$100,000 for pain and suffering for the future. In total we ask you to consider as far as steam is concerned, steam vessels, the sum of \$505,336 and for a diesel license \$528,822.

AFTERNOON SESSION

(1:45 p.m.)

THE COURT: I have a note from the jury which was received at 1:30. I will mark it Court Exhibit 3. It reads as follows:

"We have resolved our differences on the matters we have brought to you. No further evidence is required.

"Are we required to install figures in Questions 3 and 4?"

It's a little surprising to me that the jury is puzzled on that point in view of the fact that Question 3 reads, "What sum do you find as damages," etc., and Question No. 4 reads, "What is the total amount," but obviously what I must do is answer them appropriately saying, "Yes," they are required to install figures in Questions 3 and 4, and I can do that in the form of a note to be sent back to the jury, and perhaps I prefer to do it that way, so let's work up the wording and I'll be glad for counsel's comments.

Why don't we all do a little drafting? I'll do some drafting, and then I'll tell you what I have drafted if you tell me what you have drafted.

CLINICAL RECORD

HISTORY—Part I

NATURE AND DURATION OF COMPLAINTS (Include circumstance of admission)

CC - Pain in legs

HISTORY OF PRESENT ILLNESSES

63yo male diabetic s/p carotid endarterectomy in 197⁷
 No symptoms of stroke or TIA's ~~no history~~

Pt c/o sticking pains in both legs also numbness
 and tired feeling in legs (10%) symptoms occur after walking
 less than 100 yards. around 6 months ago pt could walk 2-3 blocks.

Claudication 1st noted approx 6 mo. ago. ~~present~~
 claudication occurs from hip to toes

after walking - 1st calf tightens followed by pains.

No rest pains. Pt does not awaken at night with leg pains
 Ingoterra ~3 years associates it with onset of diabetes -

(Continue on reverse side)

PATIENT'S IDENTIFICATION (For typed or written entries give: Name—last, first,
middle; grade; date; hospital or medical facility)

REGISTER NO.

WARD NO.

-2E

24 55 43 01/23/81
 AKERHARIS, CALOON
 AS 04/02/13 H

HISTORY—Part I
 Standard Form
 General Services Administration and
 Interagency Committee on Medical Records
 FPMR 101-11.906-8
 October 1978

DOCTOR'S PROGRESS NOTES
(Sign all notes)

DATE

OCT 19 1977

B.P. 120/60 Pt states his eyes cleared up.
Tylonal keeps arthritis pain under control
although he complains of weakness in
legs 1-1 h after medication. Will add
heparinosis - No other problems.
① Rx: R See 3 mos. Caldwell M.D.

NOV 8 1977

Notes

NOV 10 1977

Patient came to Clinic
without appointment because

Dental

JAN 16 1978

① Pt states he had some episode of passing out.
Was seen at ^{out} Hospital here in Orlando & had surgery
in left carotid artery. Will get records.

② B.P. 170/70

589 (142-156) wt. 159

③ See problem sheet

④ Get records from O-R Hosp. Rx: - Test tape -
Get FBS & 2 h PP before next visit.

Caldwell MD

JAN 23 1978

dx

H-11

U.S.GPO:1977-O-242-530/2104

Alemanios, Carl

3710

DOCTOR'S PROGRESS NOTES
Standard Form 509
(Reverse)

APPENDIX I

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

77 Civ. 6131 (CH5)

CARL O. AKERMANIS,

Plaintiff,

—against—

SEA-LAND SERVICES, INC.,

Defendant.

CONSENT TO REDUCE JURY VERDICT

Plaintiff, in the above entitled action, hereby consents to a remittitur of all damages on the jury verdict of \$528,000.00 against SEA-LAND SERVICES, INC. that is to be reduced by twenty-five percent for contributory negligence.

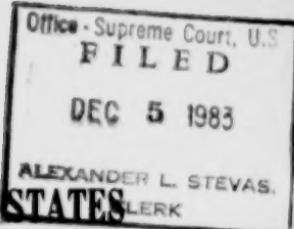
In consenting to the reduction of the verdict as above stated, plaintiff does not waive any rights which he may have to appeal nor does he waive any rights which plaintiff may have to cross-appeal in the event of an appeal by the defendant.

s/ STEVEN THALER
Steven Thaler
Of Counsel to
Markowitz and Glanstein
Attorneys for Plaintiff

Sworn to before me this
9th day of November, 1981

s/ HELEN E. GOLDSTEIN
Helen E. Goldstein
NOTARY PUBLIC, State of New York
No. 31-1492460
Qualified in New York County
Commission Expires March ____ 1983

No. 83-447



IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

SEA-LAND SERVICE, INC.,

Petitioner

against

CARL O. AKERMANIS,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

**BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI**

RICHARD H. MARKOWITZ
1100 North American Building
Philadelphia, PA 19107
(215) 875-3111
Attorney for Respondent

OF COUNSEL:

Markowitz and Richman
Steven Thaler
Robert C. Cohen

COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. When the court of appeals, at the urging of both the Petitioner and the Respondent, reversed the judgment of the district court on the ground that the district court did not have legal authority to order a remittitur based on an alleged error by the jury in assessing the degree of contributory negligence attributable to the Respondent, did the court of appeals have authority to remand the case to the district court with instructions to reconsider the district court's order which had conditionally granted a new trial to the Petitioner if the Respondent did not accept the remittitur?
2. After the court of appeals reversed the district court's judgment, without specific instructions from the court of appeals, did the district court have authority to reconsider its order conditionally granting a new trial or was the district court bound to proceed with the new trial even though it concluded that the new trial had been erroneously granted?
3. Did the district court err on remand when it concluded that the jury's assessment of 4% contributory negligence was correct and that a new trial should not be granted and therefore entered judgment on the jury's verdict?

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STATUTE AND RULE INVOLVED

28 U.S.C. §2106

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Rule 50, Federal Rules of Civil Procedure

(c) Same: Conditional Rulings on Grant of Motion.

(1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict.

(d) Same: Denial of Motion. If the motion for judgment notwithstanding the verdict is denied, the party

who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

COUNTERSTATEMENT OF THE CASE

The Respondent, a veteran seaman, sued his Employer, the Petitioner herein, under the Jones Act (46 U.S.C. §688) for injuries sustained on June 4, 1977 while working on board the Petitioner's ship. Suit was commenced in 1977. The case was tried before a jury in June 1981. In response to detailed interrogatories submitted by the district court, the jury found that the Petitioner's negligence proximately caused the Respondent's accident and the jury assessed damages in an amount in excess of \$500,000. Also in answer to a special interrogatory, the jury found four percent contributory negligence on the part of the Respondent.

In response to the Petitioner's post-trial motions, the district court in a Memorandum, Opinion and Order dated October 14, 1981 (Appendix C)¹, 521 F.Supp. 44 (S.D.N.Y.), denied the motion for judgment n.o.v. but granted a motion for a new trial on liability only unless the Respondent accepted a remittitur of all damages "in excess of that amount resulting from application of a 25% reduction for contributory negligence."

The Respondent accepted the remittitur and consented to the entry of judgment reflecting the twenty-five percent contributory negligence assessment made by the district court. In filing his consent to the entry of judgment on the reduced jury verdict, the Respondent specifically did not "waive any rights which [he] may have to cross-appeal in the event of an appeal by the [Petitioner]" (Appendix I).

After the district court entered judgment on the reduced verdict (Appendix E), the Petitioner appealed to the United States Court of Appeals for the Second Circuit. The Respondent filed a cross-appeal.

The decision of the court of appeals, dated September 14, 1982 and reported at 688 F.2d 898, is set forth as

1. All references are to the Appendices to the Petition for Writ of Certiorari.

Appendix A to the Petition. The court held that it was improper for the district court to order a remittitur based upon an alleged error in the jury's assessment of contributory negligence. Both the Petitioner and the Respondent argued to the court of appeals that the remittitur was improper; the Petitioner does not attack the conclusion of the court of appeals. Based on its holding that the remittitur was improper, the court of appeals vacated the district court's judgment.

The court then discussed whether it had jurisdiction over the cross-appeal. It concluded that it did despite the general rule, confirmed in *Donovan v. Penn Shipping Co.*, 536 F.2d 536 (2d Cir. 1976) affirmed Per Curiam, 429 U.S. 648 (1977), that a plaintiff who accepted a remittitur waived his right to appeal. The court of appeals found itself confronted with an issue "of first impression in the federal courts" (A-1).

The court of appeals reasoned that the general rule should not be applied in this case where the remittitur related not to damages but to contributory negligence. The appellate court found that the district court did not have legal authority to interfere with the jury verdict by way of such a remittitur. Since the district court had no authority to order the remittitur, the Respondent's acceptance of the remittitur could not and should not serve as a bar to the Respondent's right to appeal.

Although the court of appeals did not specifically so hold, it is submitted that when the court of appeals held that the remittitur was improper, and therefore reversed the district court judgment, the district court's order conditionally granting a new trial was necessarily vacated. The court of appeals concluded that it would be unfair and impractical to hold that the Respondent had waived its right to appeal from a remittitur which was improper not because of an abuse of the district court's discretion but because of the court's lack of power.

In reality what the court was saying was that the order granting a new trial was conditioned upon the Re-

spondent accepting the remittitur. Since there was but a single judgment and a single order by the district court, in fairness, as a matter of common sense and as a matter of sound jurisprudence, the failure of the condition because of legal impossibility, rendered the entire order (including the conditional grant of a new trial) null and void. The court of appeals concluded that the rule prohibiting an appeal by a plaintiff who accepted a remittitur simply did not apply where the court lacked the authority to order such a remittitur.

The court also reasoned that since the Petitioner's appeal was properly before it and had been ruled upon, judicial economy and efficiency dictated that the court should entertain the Respondent's cross-appeal. In so holding, the court of appeals relied upon its power under Rule 50(c) and (d) of the Federal Rules of Civil Procedure to entertain an attack on an order conditionally granting a new trial.

Although the court of appeals discussed issues raised by the Respondent in its cross-appeal, in fact and in law, the court of appeals did not enter any order as to the cross-appeal. The court of appeals did not order the district court to deny or grant a new trial. The court left that decision to the district court in the exercise of the district court's discretion based upon the district court's "feel" of the case. The court of appeals did offer suggestions to the district court as to the options available to the latter on remand.

The court of appeals' first decision was issued on September 14, 1982 (Appendix A). The Petitioner's Petition for Rehearing In Banc was denied on October 28, 1982 (Appendix B).

On remand, after the submission of briefs by the parties, the district court considered whether a new trial was warranted. On January 18, 1983, eight days prior to the filing of the first Petition for Certiorari in this Court

(No. 82-1302), the district court on remand issued a Memorandum, Opinion and Order (Appendix F) in which it considered and denied the Petitioner's motion for a new trial.

The district court concluded, in the exercise of its discretion and for independent reasons not discussed by the court of appeals but explicitly set forth in the district court opinion, that a new trial should not be granted. The district court concluded that its prior discussion of the basis for the jury's contributory negligence assessment and the court of appeals' discussion of that issue were both factually incorrect and that on reconsideration the jury's determination of a four percent contributory negligence factor was correct and did not warrant the granting of a new trial.

The district court denied the Petitioner's motion for a new trial and entered judgment in favor of the Respondent on the jury verdict subject to the 4% reduction based on the contributory negligence assessment. On March 3, 1983, the Petitioner filed a Notice of Appeal from the final judgment entered by the district court.

On April 16, 1983, pursuant to this court's request, the Respondent filed a response to the Petition. On May 16, 1983, this Court denied the first Petition.

On June 17, 1983, the court of appeals in a short order affirmed the district court's entry of judgment on the jury verdict (Appendix G).

On September 15, 1983, the Petitioner filed its second Petition for a Writ of Certiorari in this case. In the Petition at page 2, the Petitioner asserts that its seeks review of both decisions of the court of appeals — that of September 14, 1982 vacating the judgment based on the remittitur and that of June 17, 1983 affirming the entry of judgment on the jury verdict.

SUMMARY OF ARGUMENT

The decisions of the court of appeals do not involve any novel or complex issue nor do they in any way conflict with the decisions of this Court or those of other courts of appeals. Thus, there is no important or special reasons for the granting of the Petition in this case. The only difference in the posture of the case now compared to that of May 1983 when this Court denied the prior Petition is the existence of the court of appeals' second decision (Appendix G) which affirmed the entry of judgment on the jury verdict. The Petitioner has set forth eight questions presented for review. Questions numbered 1-4 and 8 are identical to the five questions raised in the first Petition. The three "new" questions simply set forth in various forms the Petitioner's claim that the district court on remand did not follow the mandate of the court of appeals. This claim is completely the product of the Petitioner's imagination. The court of appeals rejected the Petitioner's argument that the district court somehow ignored the appellate court's mandate.

Despite the Petitioner's hollow and oft-repeated claim that it has somehow been denied the right to a jury trial, the plain fact is that the judgment the Petitioner seeks to attack is based on a jury verdict. After all this time and through many briefs and appeals, the Petitioner still is attempting to avoid the original verdict reached by the jury in June 1981 which must now be finalized and enforced. Before the district court committed its first (self-confessed) error in stating that the 4% contributory negligence assessment was not supported by the evidence, the jury had properly concluded that (1) plaintiff's injury was caused by the defendant, (2) the damages amounted to \$528,000 and (3) the plaintiff was guilty of 4% contributory negligence. The parties both received their jury trial. The jury has spoken and its verdict must be enforced.

It is now clear that the jury verdict was correct and the Respondent was entitled to judgment on the verdict. The fact that in the interim the case went up and down on appeal cannot change the fact that the jury has spoken and that the Respondent is entitled to the benefit of the jury's decision. There is not and never was any basis for requiring another trial. The Petitioner is simply upset that its own appeal of the original judgment has resulted in the imposition of greater liability against it. Had the Petitioner not appealed the remitted judgment, its liability would have been reduced by 25%. However frustrated the Petitioner may be with the fact that its own appeal backfired on it monetarily, this outcome did not result from any violation of the Petitioner's right to a jury trial. The Petitioner could have been similarly disappointed by a retrial which resulted in a larger damage award.

There has been no interference with the right to a jury trial since all issues were fully and properly submitted to the jury. The result now is that, after the remand, the jury's verdict has been fully implemented.

The Petitioner does not attack the court of appeals holding that the remittitur was improper. In fact, the Petitioner urged that result in the court of appeals. The Petitioner does not argue with the order of the court of appeals which reversed the judgment of the district court.

The Petitioner's argument relates to the rather simple but highly theoretical and conceptual question as to what remained of the district court judgment and order after the remittitur was held invalid. The district court had entered a conditional order to the effect that a new trial would be granted unless the Respondent accepted a remittitur. The Respondent accepted the remittitur and thus a new trial was not granted. The court of appeals held that the district court had no authority to order a remittitur relating to contributory negligence.

The remaining issue concerned the status of the case on remand. The Petitioner argues that after the dis-

trict court judgment was reversed, the conditional order granting a new trial somehow became effective, unconditional, mandatory and immutable. The Petitioner argues at page 8 of the Petition that it appealed only from that portion of the district court order conditionally granting a new trial. The Petitioner claimed that since the remittitur was improper it was entitled to an order unconditionally granting a new trial. The Petitioner does not explain how such a conditional, interlocutory order was subject to appeal.

Once the court of appeals reversed the district court's order, the order conditionally granting a new trial had no continuing life, vitality or effect. The only alternative left to the court of appeals, whether it considered the Respondent's cross-appeal or not, was to remand the entire case to the district court to rule on the outstanding motion for a new trial. On remand, in the absence of a final order or judgment, the district court was itself free to consider *ab initio* the motion for a new trial.

This Court need not decide whether the court of appeals had jurisdiction over the cross-appeal because the court of appeals had power to reverse the judgment and remand without considering the cross-appeal.

After the final judgment was properly vacated by the court of appeals, on remand the district court had the inherent power to rescind or modify its interlocutory order granting a new trial. Since the new trial order was conditional and the condition failed, first because the Respondent accepted the remittitur and second because of legal impossibility, simple logic dictates that the new trial order itself failed and could not revive on its own. Moreover, since the district court entered the order conditionally, it was only proper for the court of appeals to remand to allow the district court to decide what action it should take with knowledge that the remittitur device was not available to it.

In order to suggest a basis for the granting of a Writ, the Petitioner argues that the court of appeals' decision

conflicts with this Court's decision in *Donovan v. Penn Shipping Co., Inc.*, 429 U.S. 648 (1977) which prohibits appeals by a plaintiff who has accepted a damage remittitur attacked as an abuse of discretion. Since the court of appeals held that the district court had no authority to offer the remittitur, the *Donovan* rule does not apply. The *Donovan* rule prohibits a plaintiff from attacking a remittitur by way of appeal on the theory that the plaintiff cannot attack that to which he has consented. The rule was created in a case where the power to order a remittitur was not being questioned. The question on appeal was one of abuse of discretion in granting a remittitur. The rule cannot be extended to apply to a situation where the district court was without authority to utilize the remittitur device. In this case, the Respondent was not attacking the remittitur; the Petitioner had successfully done that. In this case, the Respondent was attacking the order conditionally granting a new trial. See Rule 50(c). The result reached by the court of appeals was correct even if the court did not have the power to consider the appeal. Without considering the appeal, the court of appeals had authority to remand to the district court for further proceedings.

REASONS FOR DENYING THE WRIT

A. The court of appeals had jurisdiction to entertain the Respondent's cross-appeal.

Although the Respondent does not believe that it was necessary for the court of appeals to decide that it had jurisdiction over the cross-appeal (see Section B below), it is clear that the court of appeals did find that it had jurisdiction to consider the cross-appeal notwithstanding the fact that the Respondent had agreed to the remittitur.

The court of appeals properly distinguished *Donovan v. Penn Shipping Co., Inc.*, 429 U.S. 648 (1977) on

the ground that in the instant case the court had concluded that the district court did not have power to order a remittitur based upon an adjustment in the contributory negligence percentage. In *Donovan*, the remittitur was based upon an adjustment in the damages assessed by the jury. Prior decisions of this Court had held that such a remittitur on damages is permissible. A plaintiff who accepts a remittitur on damages is precluded from challenging the remittitur on appeal.

In *Donovan*, this Court spoke of remittitur in terms of the role of the courts in reviewing the size of jury verdicts. 429 U.S. at 649. As pointed out by the court of appeals, the remittitur which the district court used in this case did not involve a review of the size of the damage award but a change in the jury's assessment of comparative negligence. The decisions of this Court upholding damage remittiturs but precluding damage additurs (see *Dimick v. Schiedt*, 293 U.S. 474 (1935)) clearly require the conclusion that remittitur in regard to contributory negligence is an impermissible interference in the jury's province. Thus, the rule of *Donovan* cannot properly be applied to this case for two reasons: (1) the Respondent could not be bound by his consent to an act by the court which the court had no legal authority to take; and (2) the Respondent's cross-appeal, as considered by the court of appeals, did not attack the remittitur but the order conditionally granting the new trial. Once the court of appeals vacated the remittitur, the order conditionally granting the new trial remained before it for disposition.

In this case, the court of appeals found that the district court was absolutely without authority in ordering a remittitur in relation to contributory negligence because such a remittitur interfered with the right to a trial by jury. The Petitioner does not challenge the court of appeals' holding on the remittitur issue. The court of appeals stated that it was "conceptually difficult and practically unfair" to hold that the Respondent had waived its right to appeal by consenting to a judgment that no

longer existed. The case was before the court of appeals on the Petitioner's appeal and there was no reason not to entertain the Respondent's appeal. This Court's decision in *Donovan* simply does not speak to the unique facts of the instant case.

Since in accepting the remittitur the Respondent had specifically reserved his right to cross-appeal in the event of an appeal by the Petitioner (Appendix I), the Respondent's appeal was properly before the court of appeals.

B. The result reached by the court of appeals is correct even without a finding that it had jurisdiction to consider the cross-appeal.

The judgment of the district court from which the appeal and cross-appeal were taken is set forth at Appendix E to the Petition. There is but a single "JUDGMENT ON A REDUCED VERDICT." Once the court of appeals determined that the district court had no authority to order the remittitur, the court reversed the judgment of the district court. This reversal of the judgment of the district court had the effect of not only setting aside the remittitur but also setting aside the order conditionally granting the new trial. Once the court of appeals reversed the district court's judgment, nothing remained of that judgment. The Petitioner seems to argue that once the court of appeals properly held that the remittitur was impermissible, the conditional order granting a new trial somehow became effective and unconditional. It argues that its appeal was limited to attacking the remittitur and to its claim that it was entitled to an unconditional order for a new trial. The Petitioner argues that in its appeal, it could attack the conditional new trial order but that the Respondent could not argue that the new trial order should not have been granted even conditionally.

It is, of course, possible to argue that theoretically the two parts of the district court's order and judgment could be separated and that once the remittitur was set aside, the order for a new trial could stand on its own. However, this is not how the judgment and order were written. The two were structured in conditional language. The district court gave the Respondent the option of accepting the remittitur or facing a new trial. When the Respondent accepted the remittitur, the new trial grant no longer was operative. When the court of appeals held that the district court had no authority to impose such a condition upon the Respondent, the entire judgment and order had to be set aside by the court of appeals.

Once the court of appeals reversed as to the remittitur, even if the court of appeals had not gone on to discuss or consider the cross-appeal, the result on remand to the district court would have been the same. Once the court of appeals reversed the judgment of the district court, there was no longer in existence any final order or judgment in the case. Accordingly, upon remand, the district court had the authority, even without specific guidance or instructions from the court of appeals, to consider *de novo* granting a new trial.

The Petitioner has cited *United States ex rel. Greenhalgh v. F.B. Rich Co., Inc.*, 520 F.2d 886 (9th Cir. 1975) at page twenty-four of the Petition and now concedes that if the court of appeals had not discussed the new trial issue, upon remand, the district court would not have been bound by the law of the case to its own prior order granting a new trial and would have been free to rule *de novo* on the new trial question.² The Petitioner complains that the district court should have been allowed to do so without comment from the court of ap-

2. At page 21 of its prior Petition (82-1302), the Petitioner argued that under *Greenhalgh, supra*, on remand the district court would not have been free to reconsider the new trial question.

peals which may have interfered with the exercise of the district court's discretion.

In *Greenhalgh*, the doctrine of the law of the case was applied in a situation under Federal Rule of Civil Procedure 50(c) in which under the Rule, the court of appeals had specific authority not only to review the judgment n.o.v. but also the conditional order entered by the district court granting a new trial. In such cases, as the court of appeals noted in its opinion in this case (A-8), the Rule specifically requires a district court in granting a judgment n.o.v., to rule on the motion for a new trial on a conditional basis so that on appeal, both orders can be reviewed if necessary. Rule 50(c) specifically provides that the conditional order granting a new trial does not render the judgment a non-final judgment.

In deciding that it had jurisdiction to entertain the cross-appeal, the court of appeals found that the situation in the instant case was similar to the situations provided for in Rules 50(c) and 50(d). The court reasoned that if a conditional order granting a new trial does not affect finality and can be considered by courts of appeals under appropriate circumstances, the circumstances of the instant case required the same result. The court of appeals pointed out that under Rule 50(d), the court of appeals is not precluded from determining whether an appellee is entitled to a new trial or from directing the trial court to determine whether a new trial should be granted. That is precisely what the court of appeals did in this case.

Even if the district court did not reconsider the new trial question prior to conducting a second trial, clearly the propriety of requiring the new trial could have been raised in the court of appeals by Respondent after a second trial. Hindsight reveals that had a second trial been held, after that trial, the district court would have confessed its error in originally granting the motion for the new trial for the same reasons it set forth in its Opinion of January 18, 1983 (Appendix F). After the second trial,

the district court would have admitted that it should not have ordered the new trial. At the very least, the order granting the new trial would have been reviewed by the court of appeals following a second trial.

In *Taylor v. Washington Terminal Company*, 409 F.2d 145 (D.C. Cir. 1969), cert. denied, 396 U.S. 835 (1969), the plaintiff refused to accept a remittitur as to damages. A second trial was held which resulted in a substantially lower damage award for the plaintiff. The plaintiff appealed alleging that the trial judge abused his discretion in granting the remittitur. The court of appeals agreed with the plaintiff, set aside the order granting the new trial and ordered reinstatement of the original verdict for the plaintiff. The same result was reached in this case without the need for a second trial.

The decision of the court of appeals in considering the cross-appeal can easily be sustained on alternative grounds. To reach the result it did, the court of appeals did not have to rely upon the existence of a cross-appeal. Since it had the case before it on the Petitioner's appeal, the court of appeals had authority to consider other issues raised by the case even in the absence of a cross-appeal. The requirement of a cross-appeal is a rule of practice and not a rule of jurisdiction. See *Lucas v. Gulf and Western Industries, Inc.*, 666 F.2d 800, 805 (3d Cir. 1981); *Scott v. University of Delaware*, 601 F.2d 76, 82-84 (3d Cir. 1979), cert. denied, 444 U.S. 931 (1979); *Butler v. First National Bank*, 552 F.2d 1112, 1114 (5th Cir. 1977); *Arnold's Hofbrau, Inc. v. George Hyman Construction Co., Inc.* 480 F.2d 1145, 1150 (D.C. Cir. 1973). See also 15 Wright, Miller and Cooper, Federal Practice and Procedure §3904 (1976). Cf. *Massachusetts Mutual Life Co. v. Ludwig*, 426 U.S. 479 (1976). Thus even if the Respondent had not filed a cross-appeal, the court of appeals had jurisdiction to review the status of the conditional order granting the new trial. Indeed the Petitioner argues that in its appeal it attacked the new trial order arguing that it should have been unconditional.

28 U.S.C. §2106, set forth at page iv, above, specifically provides that an appellate court may modify, vacate, set aside or reverse any judgment lawfully brought before it for review. The Petitioner herein brought the district court judgment before the court of appeals. Without even considering the cross-appeal, the court of appeals had authority, after vacating the final judgment, to remand the case to the district court for further consideration.

In *Neely v. Eby Construction Co., Inc.*, 386 U.S. 1027 (1967), this Court upheld the authority of a court of appeals to order dismissal of an action after reversing the denial of a defendant's motion for judgment n.o.v. The Court held that as a matter of statutory power, the court of appeals had such authority under 28 U.S.C. §2106 and that this procedure was authorized under Rule 50(d). The Court held that under Rule 50(d), in the first instance, a court of appeals has authority to consider the new trial question. This does not interfere with the right to a jury trial.

Certainly the district court had authority to reconsider its new trial order after being told that the remittitur was improper and could not be attached as a condition to a new trial order. Understandably, the court of appeals did not want to engage in idle speculation as to how the district court *might* have ruled in the first instance if it had known that a remittitur was not available to it. Under these circumstances, the proper alternative was to remand to the district court which was in a better position to pass on the new trial question unrelated to the remittitur. See *Iacurci v. Lummus*, 387 U.S. 86 (1967).

The court of appeals did not consider the cross-appeal and did not act on the cross-appeal. Instead the court of appeals properly left the determination to the discretion of the district court. Certainly, that approach was more favorable to the Petitioner rather than having the court of appeals order judgment entered on the jury

verdict without the necessity of reconsideration by the district court. In *Ferguson v. Chester A. Poling, Inc.*, 285 N.Y.S. 340, 247 A.D. 727 (2d Dept. 1936), cited by the court of appeals, the appellate court under these same circumstances ordered judgment entered on the jury verdict without consideration by the trial court of the motion for a new trial. The Appellate Division held that "in theory and amount the question of apportioning the negligence was peculiarly within the province of the jury . . ." 285 N.Y.S. at 341. *Ferguson* also was a Jones Act action by a seaman for personal injuries.

C. The court of appeals did not in any way interfere with the Petitioner's right to a trial by jury nor did the court of appeals interfere with the discretion of the district court.

It must be emphasized that the court of appeals took no specific action with regard to the grant of the motion for a new trial. The court of appeals merely reversed the judgment and remanded the entire case to the district court so that the district court could exercise its own discretion.

The Petitioner claims that somehow the action of the court of appeals violated its right to a trial by jury under the Seventh Amendment to the United States Constitution. This argument makes absolutely no sense. The only jury verdict that exists is the one rendered in favor of the Respondent which included a finding of four percent contributory negligence by the Respondent. It is now clear that the district court improperly interfered with the Respondent's right to a jury trial by interfering with the jury's assessment of contributory negligence. That error was corrected in part by the court of appeals when it set aside the remittitur. On remand, the district court reconsidered the motion for a new trial and properly concluded that the jury's contributory negligence assessment was correct and that therefore a new trial

was not only unnecessary but inappropriate. The parties are now left where they should have been following the jury verdict in June 1981.

The Petitioner claims that the court of appeals interfered improperly with the district court's discretionary review of the facts found by the jury. As it would do in a Rule 50(c) situation, the court of appeals merely reviewed the record to determine the district court's "grounds for granting . . . the motion for the new trial".

What the court of appeals did was point out to the district court that the district court's opinion did not adequately set forth the court's reasons for finding that the jury had no basis upon which to find the four percent contributory negligence. The court of appeals noted in passing that, based upon its review of the record, there was at least one theory under which the jury's assessment of contributory negligence appeared to be sustainable. Nevertheless, the court of appeals deferred totally to the district court's own review of the facts.

The court of appeals made no finding with respect to its theory of contributory negligence but merely pointed out to the district court that the district court's opinion did not make it clear whether the district court had considered that possibility. Certainly the court of appeals had the authority, if not the obligation, to point out to the district court that the latter's basis for ordering a new trial needed further elaboration.

The Petitioner claims that the court of appeals' discussion interfered with the discretion of the district court. The district court's opinion on remand makes it abundantly clear that the district court exercised its own discretion without being unduly influenced by the discussion set forth by the court of appeals. The clearest proof of this is the fact that the district court in denying the motion for a new trial "carefully reviewed the evidence" again (Appendix F-9). The district court states

that this review resulted in a "significantly altered perception" of the basis for the jury finding the four percent contributory negligence.

The district court candidly admitted that its original order conditionally granting the new trial was based on a misperception but it went on to say that the suggested theory offered by the court of appeals was also not correct. Thus, the district court clearly reached its own independent conclusion concerning the propriety of granting the motion for a new trial and thereby it showed that it was not unduly influenced by the discussion in the court of appeals' opinion.

The court of appeals made it abundantly clear in Part II-B of its opinion (A-9) that upon remand, the district court was to exercise its own independent discretion whether to grant a new trial or not and, if a new trial were granted, to determine the scope of the issues to be covered in the new trial. The court of appeals stated that in the event of a new trial, it was not necessary to retry the damage issue. The court of appeals found that based upon the detailed special verdicts, it was possible to separate out the damage issue from the liability issue and the contributory negligence issue. Nevertheless, the court of appeals left the final decision to the district court in the exercise of its discretion and based upon its unique "feel" of the case. In view of the emphasis given by the court of appeals to the fact that the trial judge had discretion in all these areas, the Petitioner's claim of prejudice in the form of undue influence is clearly unwarranted.

CONCLUSION

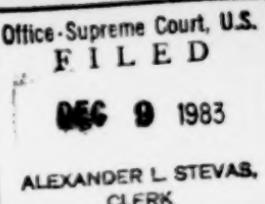
For the foregoing reasons, it is respectfully submitted that the decisions of the court of appeals are correct on the merits and do not in any event present any novel or complex issue or a conflict between circuits. Nor do the decisions conflict with any decision of this Court. Nothing said or done by the court of appeals warrants review by this Court. Judgment has properly been entered on the jury verdict in favor of the Respondent and there is no warrant to set it aside or to require a new trial on any issue. Accordingly, the Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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No. 83-447

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

SEA-LAND SERVICE, INC.,

Petitioner,

—against—

CARL O. AKERMANIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF SEA-LAND SERVICE, INC.

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**REPLY BRIEF OF SEA-LAND SERVICE, INC. IN
SUPPORT OF PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

INTRODUCTION

At the request of the Court respondent has filed a brief in opposition to the petition for writ of *certiorari* marshalling arguments in support of a conclusion that the decisions appealed from "do not involve any novel or complex issue nor do they in any way conflict with the decisions of this Court or those of other courts of appeals" [Brief p. 5]. These arguments are illogical, inconsistent and contradicted by binding decision to this Court. It is not too much to say that respondent has utterly failed to comprehend (or has sought to confuse) the fundamental issue of the jurisdiction of the United States Courts of Appeals and, in an appropriate case, their duty to affirm.

The Second Circuit Court of Appeals in its decision of September 14, 1982 (688 F.2d 898, Exhibit "A" to the Petition) reversed the district court "Judgment on a Reduced Verdict" (Exhibit "E") to which respondent had *consented* and, after finding it had appellate jurisdiction to "entertain" the cross-appeal of respondent (upon which it determined that the district court had committed *no* mistake of law or abuse of discretion), remanded the case for reconsideration of the question whether in its "discretion" a new trial ought be granted. Respondent seeks to justify the court of appeal's remand order on inconsistent grounds: that "the court of appeals had jurisdiction to entertain the respondent's cross-appeal" (reason "A" for denying the writ) or that it had not (reason "B"); and in either case that the district court retained unfettered jurisdiction to reconsider as mandated the question whether a new trial should be granted (reason "C").

By way of summary of argument, respondent argues that "[t]his Court need not decide whether the court of appeals had jurisdiction over the cross-appeal because the court of appeals

had power to *reverse* the judgment and remand without considering the cross-appeal" (Brief p. 7 emphasis supplied); and also asserts that "[a]fter the final judgment was *properly vacated* by the court of appeals, on remand the district court had the inherent power to rescind or modify its interlocutory order granting a new trial" (*Id.*, emphasis supplied). Similarly, respondent claims that on appeal to the court of appeals he was merely "attacking the order conditionally granting a new trial" (Brief p. 8); not the "remittitur," while immediately adding that the court "[w]ithout considering the [cross] appeal . . . had authority to *remand* to the district court for further proceedings (*Id.*). The last assertion is based on the truly startling claim that it was "only proper for the court of appeals to remand to allow the district court to decide what action it should take with knowledge that the remittitur device was not available to it" (*Id.* p. 7).

As an argument apparently predicated upon considerations of fairness or judicial economy, respondent, quoting the court of appeals, also urges that it was "'conceptually difficult and practically unfair' to hold that the respondent had waived its right to appeal by consenting to a judgment that no longer existed" (*Id.* p. 9-10); and that it was appropriate for the appeals court to then consider, as a cross-appeal issue, the correctness of the district court's determination of jury error (despite in the court of appeals' view the non-finality of the new trial grant after "excision" of the remittitur) for reason of the alleged fact that "[a]t the very least, the order granting a new trial would have been reviewed by the court of appeals following a second trial" (*Id.* p. 13). In way of conclusion, and as a refreshing acknowledgement of the fact that the question whether the court of appeals had jurisdiction to "entertain" the cross-appeal might after all make a difference, respondent argues that "Petitioner is simply upset that its own appeal of the original judgment has resulted in the imposition of greater liability against it," since "[h]ad the Petitioner not appealed the remitted judgment its liability would have been reduced by 25% (sic)" (*Id.* p. 6).

The first question presented by this petition is appealability, a matter of a line of decisions by this Court stretching back to

1889. The second and perhaps more important is reviewability, an issue controlled by the United States Constitution (Amend. VII) and the Judiciary Act of 1789, both of which are 100 years older.

A) APPEALABILITY

Throughout his brief respondent resolutely ignores the law settling the question of the impact on his right to appeal (*as opposed to his rights upon appeal*) which followed his consent to the Judgment on a Reduced Verdict. Because of his consent, respondent was unquestionably barred from “appeal[ing] the propriety of . . . [the] . . . remittitur order to which . . . [he] . . . ha[d] agreed” (*Donovan v. Penn Shipping Co., Inc.*, 429 U.S. 648, 649 (1977)), and as a result could not “attack[] the remittitur” which in his answering brief respondent *denies* doing in the court of appeals (*Id.* p. 8).¹ Despite this, it is clear that the question of threshold issue mistake—that the district court had assessed the correctness of the jury’s contributory negligence verdict in error—*could have been* raised by respondent as appellee, since potentially before the court of appeals because of petitioner’s appeal which challenged the remittitur upon the assumption that the new trial was properly granted. But respondent, as appellee, could have argued district court error in refusing to accept the jury verdict *only* in support of an affirmance of the judgment to which he had consented. As appellee, respondent had a right to make *any* argument in support of the judgment appealed from. *Dandridge v. Wil-*

¹ The assertion is, however, flatly untrue. In his “Brief for Plaintiff-Appellee-Cross-Appellant” in appeal nos. 81-7833/73 (p.43) respondent asserted: “[t]he reduction of the total award by the trial court in finding that the jury erred in finding the plaintiff 4% contributorily negligent is not an additur nor is it a remittitur and constituted an abuse of discretion and an error of law in violation of plaintiff’s right to a trial by jury.” Importantly, respondent’s assignment of error in the court of appeals was based on *two* grounds: (1) the district court could not validly order the remittitur; and, (2) the trial judge had done so in error as a result of mistakenly deciding the threshold jury error issue on a basis confusing contributory negligence and assumption of risk (*Id.* at p. 44) or as a result of an abuse of his discretion.

liams, 397 U.S. 471, 475 n. 6 (1970). It is settled law that "[an] appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matters overlooked or ignored by it." *United States v. American Ry. Express Co.*, 265 U.S. 425, 435 (1924).

Thus, respondent, despite his consent to the remittitur, had the limited right to urge that although the district court erred in conditioning the denial of petitioner's new trial motion on respondent's acceptance of an invalid remittitur, the Judgment on a Reduced Verdict should be *affirmed* because the district court had *also* committed reviewable error in concluding that there ought to be a retrial because the jury's fact finding was "clear and serious error." See, *Durant v. Surety Homes Corp.*, 582 F.2d 1081, 1085 (7 Cir. 1978).

But respondent challenged the correctness of the district court's determination of the jury error issue not, as solely appropriate, as appellee in support of affirmance, but as cross-appellant seeking entry of judgment on the jury verdict.² As a result, the question of the correctness of the district court's decision on the threshold issue might be said to have been *res judicata*, not on account of respondent's consent, but for reason of lack of effective challenge as appellee.

As a general matter only a party cast in judgment has standing to appeal, despite the fact that an issue not necessary to the ultimate determination was resolved against the prevailing party. *Lindheimer v. Illinois Bell Telephone Co.*, 292 U.S.

2 In his "Brief for Plaintiff-Appellee-Cross-Appellant" in appeal nos. 81-7833/73, respondent failed entirely to discriminate those arguments (if any) which he intended to make as appellee, as opposed to as cross-appellant. As a matter of definition, however, an appellee's arguments are in support of affirmance. Thus, the "Conclusion" of respondent's brief on the appeal and cross-appeal was as follows: "In view of the foregoing, the defendant's appeal should in all respects be denied and plaintiff's appeal [seeking entry of judgment on the jury verdict] in all respects granted." But an "appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary . . ." *United States v. American Railway Express Co.*, *supra*, 265 U.S. at 435.

151, 176 (1934); *New York Telephone Co. v. Malthie*, 291 U.S. 645 (1934); *Public Service Commission v. Brashear Lines*, 306 U.S. 204 (1939). In such circumstances if the party cast in judgment appeals, it "behooves" the party in whose favor judgment was entered as appellee, to "present all possible grounds for affirmance to the appellate court, including the argument that, as to the issue adjudicated against him, the trial court was in error." Moore's, *Fed. Prac.*, Vol 1B § 0.416[5] p. 533-534. Such obligation is more than a precautionary measure, necessary to avoid implication that the "adverse issue" was dispository adjudicated (*Id.* at p. 533), where as here, the adverse issue—jury mistake in assessing contributory negligence—was the basis of the district court's mistaken remittitur.

Since the court of appeals was required to treat respondent's cross-appeal as barred by his consent, the result, if his argument of district court mistake on the predicate issue (if properly treatable as made by respondent as appellee) had been considered and accepted, would have been affirmance of the Judgment on a Reduced Verdict. Nonetheless, as a necessary preliminary to enhancing respondent's position as a direct consequence of his consent, by extending to him as a result the possibility of obtaining a judgment without retrial for more than he had agreed to take; and in order to avoid this Court's decision in *Donovan v. Penn Shipping Co., Inc., supra*, the court of appeals described the issue preliminary to remand as follows: 688 F.2d at 903 [A-8].

[w]hat we really face is an issue that has nothing to do with acceptance of remittitur: [it is] whether a cross-appeal will lie as to a non-final order for a new trial when the main appeal from a final judgment has already brought the case to an appellate court.

But if the appeal truly had "nothing to do with acceptance of remittitur" there would be, of course, no reason for petitioner's challenge to respondent's right to a cross-appeal. And neither would petitioner be "upset" because its own appeal from the original judgment could not have "resulted in imposition of [21%] greater liability against it."

It is certain from this Court's holding in *Donovan v. Penn Shipping Co., Inc.*, *supra*, that respondent could not himself appeal from the propriety of *entry of* the "remittitur order" to which *entry* he agreed, and that he had, hence, no right to challenge, *as a basis for entitlement to a judgment upon the jury's verdict*, the threshold jury error finding either on the appeal decided September 14, 1982, or on any prospective appeal after retrial. The argument raised by the Court of Appeals, that respondent, unless the cross-appeal could be considered, would be unfairly denied an "appeal", as a result of a bargain (for an invalid remittitur) of which he was deprived, is proven invalid by the fact that he might have gotten what he agreed to by urging predicate issue error as grounds for affirmance, despite the invalidity of the remittitur. And this would merely hold respondent to what he, after all, bargained for: the Judgment on a Reduced Verdict proof against attack on appeal on the basis of argument that a new trial should not even conditionally been granted. It is for reason *precisely* of the fact that it was *not* "conceptually difficult and practically unfair to think of the plaintiff as having waived a cross-appeal by consenting to judgment that no longer exists" (688 F.2d at 903, A-7)—because respondent lost nothing necessarily in way of appeal *argument* and, despite the remittitur's invalidity, got exactly what he bargained for—that the court of appeals' refusal to follow *Donovan* is proven to be error.³

Because respondent (as appellee) *had* the right to challenge the district court's threshold finding, *Donovan v. Penn Shipping Co., Inc.*, *supra* cannot validly be distinguished. And this

3 Respondent was "bettered" by consenting to the remittitur—he got more than he had agreed to take and a re-trial was avoided on the "liability issue" and with that the possibility of a defendant's verdict. This result cannot be permitted. *Mattox v. News Syndicate Co.*, 176 F.2d 897, 904 (2 Cir. 1949). Similarly, the court of appeals did not need to invent Rule 50(c) F.R.Civ.P. "jurisdiction" over the cross-appeal in order to consider whether there was reviewable threshold issue error; and its doing so cannot be said to have promoted "judicial economy."

Court's holding was violated, a conclusion proven by the fact that judgment was thereafter entered on the jury verdict, a result the *Donovan* holding absolutely does not allow.⁴

But, in any event, the court of appeals simply had no right to treat the district court's determination of the threshold issue as *other than* an issue that it either (1) needed to *decide* in the main appeal (in order to assert respondent's right as appellee to seek an affirmance); or (2) had to *assume* as settled for all purposes (objection having been deliberately or inadvertently abandoned because not *appropriately* challenged on appeal).

The court of appeals, indeed, had the power (and obligation) to reverse without considering the cross-appeal; but only to order a new trial by affirming the district court's exercise of discretion or holding that the issue of threshold error had been abandoned. And with that would have resulted the *loss* by the district court of its "inherent power" to recall its no longer interlocutory but affirmed (or dispositively adjudicated) new trial grant. *United States v. ex rel. GREENHALGH v. F.D. Rich Co., Inc.*, 520 F.2d 886 (9 Cir 1975).

B) REVIEWABILITY

Having had *in no event* power to ever review the district court's new trial order for "error" of the kind the appeals court asserted, the court of appeals had no authority to remand to the district court for further consideration. A trial judge is not required to enter supporting findings of facts and conclusions of law where granting a new trial motion. *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 n. 3 (1980)

4 Respondent, for this reason, could not properly have attacked the remittitur, a matter so obvious as to encourage denial of respondent's former appeal position. Petitioner surely attacked the remittitur; and successfully—the district court's "remittitur" was an additur. But by virtue of being *right* on appeal (since if petitioner had been *wrong* there would have been no conceptual difficulty or practical unfairness resulting from affirmance) petitioner pays 21% more. Small wonder petitioner is "upset."

and Rule 52(a) F.R.Civ.P.⁵ For this *additional* reason, assuming for purposes of argument only that the court of appeals could have correctly considered the cross-appeal, or, as might appear appropriate, should have considered respondent's arguments for reversal as grounds for affirmance, it had to decide the question of alleged predicate issue mistake, since *ripe* for review, on the basis of the record as it then stood. And since the district court's "clear and serious error" finding (if brought before the court) was not reviewable, the new trial grant had to have been affirmed.

There can be no question that the court of appeals violated United States Constitution, Amend. VII and the Judiciary Act of 1789 in re-examining facts found by the jury. The court of appeals asserted a right to remand the case because of possibility of district court error of a kind which is *undeniably* non-reviewable. *Fairmont Glassworks v. Cub Fork Coal Co.*, 287 U.S. 474 (1933). Where an appeal to a court of appeals involves only argument from conflicting interpretations of facts underlying a grant or denial of a motion for a new trial, one of which, as here, finds support in the evidence (as the court of appeals specifically held), and which, for that reason, does not present a reviewable issue of law, the court on its own motion should dismiss as "frivolous." *United States v. Johnson*, 327 U.S. 106, 113 (1946).⁶ *A fortiorari*, where in deference

⁵ Despite this, respondent justifies the extravagance of the court of appeal's decision, requiring the district court to consider a factual "argument" not thought of by counsel or the district court, because "the district court's opinion did not adequately set forth the court's reasons. . ." (Brief p. 16); and, because "[c]ertainly the court of appeals had the authority, if not the obligation, to point out to the district court that the latter's basis for ordering a new trial needed further elaboration." (*Id.*)

⁶ *Johnson, supra*, was a criminal case. But "[t]here is no policy reason—indeed, if anything, the policy is less—for a broader scope of appellate review of findings of fact made on new trial motions in civil actions than in criminal actions, where the liberty of the defendant is at stake." Moore's *Fed. Prac.*, Vol 6A § 59.15(3) pp. 59-335, n.53.

to the fundamental rule respondent made *no such argument*, the court of appeals' mistaken labor on his behalf cannot be appropriate.

C) THE SUBSEQUENT "DISCRETION" OF THE DISTRICT COURT

Respondent argues that the court of appeals "did not consider the cross-appeal and did not act on the cross-appeal" (Brief p. 14); and that the district court was not "unduly" influenced by the court of appeals' opinion (*Id* p. 17). The district court's remittitur was, whatever else, an expedient; an alternative to a new trial. Respondent insultingly insists that the unavailability of remittitur was a matter which the trial judge should *properly* have been asked to consider in determining whether to grant a new trial. Yet, respondent would appear to be claiming that the district court was not influenced (unduly?) by the fact that it had been told that if it changed its mind and declined to order a new trial on the basis of the *alternative* expedient offered by the court of appeals (and, as subsequent events proved, any other) its decision would be affirmed. Respondent's argument, untenable on its own terms, admits that the court of appeals' opinion was purely advisory.

The issues raised by this petition must in any event be considered in light of what the result would have been had the court of appeals acted properly; not whether, despite the fact that the court acted improperly, its error can be said to have been without effect.

CONCLUSION

The court of appeals decision of September 14, 1982 represents error of a most sensitive kind. However unintended, the disposition of this case can be read as suggesting that it is permissible for the district courts to abandon concern for whether a jury's verdict is manifestly unjust; that avoidance of re-trial as a matter of needed "judicial economy" is *the* appropriate guide and that the court of appeals is entitled by whatever means to require adherence to this view. Surely, the court of appeals simply erred in reaction to too great concern for the alleged "sanctity" of jury verdicts; but this too is error. It should be reminded that insistence upon more exact justice, greater predictability and higher standards of what constitutes appropriate trial "tactics"—not exercise of invented powers having the likely result of making the problem worse—is the sole appropriate and effective response to increasing calendar pressure.

Respectfully submitted,

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